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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 IN RE: 15-mc-40 (AKH)

4 AMERICAN CAPITAL PROPERTIES, INC.
5 LITIGATION
-----x

6 New York, N.Y.
7 August 24, 2017
8 10:40 a.m.

9 Before:

10 HON. ALVIN K. HELLERSTEIN

11 District Judge

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16
17
18 (In open court)

19 THE COURT: As I had stated, we will walk through with
20 the experts first on the motions for certification, the overall
21 issue being if, after my rigorous analysis, I find evidence to
22 show that the alleged misrepresentations alleged in the third
23 amended complaint affected ARCP's stock prices between May 9,
24 2012 and October 29, 2014.

25 How shall we begin? I guess there's a rebuttable

H80AARC1ps

Opening - Ms. Wyman

1 presumption, so that the defendant has the burden to rebut the
2 presumption alleged in the complaint. Am I right, Mr. Edelman?

3 MS. WYMAN: Good morning, your Honor. I believe that
4 what we need to do is --

5 THE COURT: So I don't embarrass myself and others,
6 the first time you speak, please identify yourself.

7 MS. WYMAN: Sure. Debra Wyman, your Honor.

8 I think that it makes most sense for plaintiff to lay
9 out the evidence that shows that the fraud-on-the-market
10 presumption is applicable in this matter.

11 THE COURT: So you want to go first.

12 MS. WYMAN: Yes, please.

13 THE COURT: Any objection?

14 MR. EDELMAN: No, your Honor. We would agree, it's
15 their burden of proof to come forward with evidence on market
16 efficiency.

17 THE COURT: OK. I'm wrong and incorrect.

18 OK. Go ahead.

19 MS. WYMAN: Plaintiffs called Dr. Steven Feinstein to
20 the stand.

21 THE COURT: You want to make some opening, give me
22 some kind of direction?

23 MS. WYMAN: If your Honor would believe that's
24 helpful, I'm happy to.

25 THE COURT: Yes, I believe it would be helpful.

H80AARC1ps

Opening - Ms. Wyman

1 MS. WYMAN: OK. I'll go to the lectern so you can
2 hear me.

3 As your Honor just mentioned, the fraud-on-the-market
4 presumption is a rebuttable presumption.

5 THE COURT: It would be more helpful if you speak
6 loudly.

7 MS. WYMAN: OK. Is that better?

8 THE COURT: It's better if you speak loudly. Don't
9 worry about the microphone.

10 MS. WYMAN: OK. As your Honor just mentioned, the
11 fraud-on-the-market presumption is a rebuttable presumption.
12 It allows the plaintiff to presume reliance and not have to
13 show that individually for each class member, permitting us to
14 get the class certified in a securities fraud class action
15 case.

16 The presumption is shown through the analysis of
17 various factors called *Cammer* factors and *Krogman* factors. And
18 through those factors an economist can look at the market and
19 its different attributes to determine whether or not the market
20 is receiving information, processing that information, and
21 reflecting that information in the price that the public sees
22 and pays and trades on the stock or the other securities for.

23 It's a pretty straightforward showing. It's something
24 that is testable by various statistical tests, if you're
25 looking for direct evidence of market efficiency. But the

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Opening - Ms. Wyman

1 Second Circuit in *Petrobras* about six weeks ago counseled that
2 the *Krogman* and *Cammer* factors need to be viewed holistically.
3 So there are eight factors in total, seven of which are deemed
4 to be indirect evidence.

5 THE COURT: "Cammer factors" is C-a-m-m-e-r factors.

6 MS. WYMAN: Yes, your Honor.

7 THE COURT: And the other one is?

8 MS. WYMAN: *Krogman*, K-r-o-g-m-a-n, which is, I
9 believe it's a district court case from the District of Texas.

10 THE COURT: So not all of these are contested, not all
11 of these factors are contested. Am I right?

12 MS. WYMAN: I don't believe that it is necessarily
13 contested, but Dr. James didn't test any of those factors apart
14 from the empirical factor, which is *Cammer* factor five.

15 THE COURT: Do I need testimony on all factors?

16 MS. WYMAN: You need testimony on all factors, your
17 Honor, because the Second Circuit has said that the district
18 courts must use each of the factors in a totality-of-the-
19 evidence standard. So you have to hear everything in order to
20 do a rigorous analysis and come to a decision that the
21 presumption has been met.

22 THE COURT: I don't have to hear what I can read and
23 what is not contested. And I read it. So there's a lot
24 that's -- it's not at all contested.

25 Why don't you proceed the way you want to proceed and

H80AARC1ps

Opening - Mr. Edelman

1 we'll deal with it.

2 MS. WYMAN: I promise, it won't be painful trying to
3 proceed.

4 THE COURT: Mr. Edelman, do I need to hear everything,
5 your witness, or can I rely on what I read and just focus on
6 what's disputed?

7 MR. EDELMAN: Your Honor, I think the way to proceed
8 would be, you can rely on what you've read. I think the
9 opportunity of this hearing should be for us to focus on the
10 issues that are in dispute.

11 The experts both agree that while a number of the
12 factors, like float and capitalization, are indicative of
13 market efficiency, that economists agree that a market study is
14 what evidences market efficiency.

15 This is an unusual situation in this case, because
16 ARCP changed dramatically over the class period.

17 THE COURT: Right.

18 MR. EDELMAN: By the end of the class period, we're
19 talking about a \$24 billion asset company, and yet at the
20 beginning of the class period, we're talking about something
21 that had about \$75 million of market cap. It will be our
22 contention at this hearing that for the first two thirds of the
23 class period, plaintiffs have failed to meet their burden.
24 We're not challenging with respect to the common shares that
25 plaintiffs have met their burden of showing market efficiency

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Opening - Mr. Edelman

1 for the period after the Cole merger when the market cap went
2 way up, but our focus will be on those first two periods. And
3 what you're going to see, your Honor, is that when they did
4 their market efficiency tests, they had to do backflips and
5 change all sorts of things to make them work, and then they
6 still don't work if done properly.

7 In addition, we will be focusing on the preferred
8 shares and the notes for which we do not believe that
9 plaintiffs have made the requisite showing. For those
10 instruments, they didn't do the collective event study because
11 they knew it would fail, and they did another supposed
12 controlled experiment, which wasn't an experiment at all.
13 Basically they just looked at the reaction of the market on
14 October 29, when it was being blasted across CNBC and *Wall*
15 *Street Journal* that there was an issue, and they said, did the
16 stock price react to that. And based on that, they're
17 inferring that the market was efficient over the entire prior
18 class period.

19 So those are the issues that we want to highlight for
20 your Honor. Certainly your Honor can also rely on what you
21 read and what has been submitted, but we think this hearing is
22 an opportunity for your Honor to test the experts and some of
23 the key issues that are contested.

24 THE COURT: All right. Ms. Wyman, proceed.

25 MS. WYMAN: Your Honor, plaintiff calls Dr. Steve

H80AARC1ps

Feinstein - direct

1 Feinstein.

2 THE COURT: Dr. Feinstein, please step up.

3 STEVEN P. FEINSTEIN,

4 called as a witness by the plaintiffs,

5 having been duly sworn, testified as follows:

6 THE COURT: You may inquire, Ms. Wyman.

7 DIRECT EXAMINATION

8 BY MS. WYMAN:

9 Q. Dr. Feinstein, can you please introduce yourself to the
10 Court.11 A. I'm Steven Feinstein. I'm an associate professor of
12 finance at Babson College and a chartered financial analyst.

13 Q. And do you hold a Ph.D. from Yale University?

14 A. I do.

15 Q. And what concentration?

16 A. The degree is in economics, with a concentration in
17 finance.

18 Q. And what year did you get that degree?

19 A. 1989.

20 Q. You mentioned that you're a CFA. What is that?

21 A. It's a chartered financial analyst. The "chartered
22 financial analyst" designation is the premier credential for
23 practicing financial analysts worldwide.

24 Q. Did you have to pass an exam to gain that designation?

25 A. It's a series of three exams over a course of three years.

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1 It covers the body of knowledge that the Chartered Financial
2 Analyst Institute considers the important generally accepted
3 wisdom in the field of financial analysis, quantitative methods
4 and so forth.

5 Q. Were you asked by plaintiffs to study the various ARCP
6 securities?

7 A. I was.

8 Q. What was your assignment?

9 A. To examine the markets and the securities and assess, using
10 whatever tests I thought were appropriate, whether or not those
11 securities traded in efficient markets, in efficient markets or
12 not, maybe inefficient markets, over the course of the class
13 period or during those portions of the class period in which
14 they traded.

15 Q. Which of ARCP's securities did you examine?

16 A. I looked at the common stock, the preferred stock, and the
17 bonds that were issued during the class period.

18 Q. Dr. Feinstein, have you ever acted as an expert witness in
19 this capacity prior to today?

20 A. Yes.

21 Q. On how many occasions?

22 A. 80 or more.

23 Q. Did all of those assignments include an analysis of whether
24 a securities market was efficient?

25 A. Most did.

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1 Q. Have you ever worked on and done litigation where you
2 studied common stock, preferred stock, and bonds for the same
3 company?

4 A. Yes.

5 Q. In what case was that?

6 A. In a few cases, but most recently *Petrobras* in this
7 district.

8 Q. That case is pending before Judge Rakoff?

9 A. Correct.

10 Q. In that case did you provide opinions to Judge Rakoff
11 concerning the efficiency of *Petrobras*'s common stock,
12 preferred stock, and bonds?

13 A. Yes.

14 Q. What was your conclusion there?

15 A. That those --

16 THE COURT: I'm not interested in *Petrobras*. I'm
17 interested in this case.

18 MS. WYMAN: This is the last question, I promise.

19 THE COURT: This is not the question you're going to
20 ask, because it's objected to I'm sustaining the objection.

21 Q. Dr. Feinstein, have you ever been subjected to a successful
22 *Daubert* challenge?

23 A. No.

24 THE COURT: What's the relevance of that?

25 MS. WYMAN: I just wanted your Honor to understand

H80AARC1ps

Feinstein - direct

1 that his --

2 THE COURT: It has no relevance. Stick to what's
3 relevant here.

4 MS. WYMAN: Yes, I will.

5 Q. Did you perform the work necessary to make the
6 determinations that you made in this case?

7 A. Yes.

8 Q. And were you able to form any opinions concerning the
9 efficiency of the ARCP securities that you studied?

10 A. Yes. I conducted the analysis and found that those
11 securities traded in efficient markets over the course of the
12 class period or during those portions of the class period in
13 which they traded.

14 Q. And did you prepare a report that described the --

15 THE COURT: What's meant by "an efficient market"?

16 THE WITNESS: Well, an efficient market is a market in
17 which investors and analysts don't ignore relevant, important
18 news, but, rather, they receive the news, they have the ability
19 to receive the news, process the news, trade on the news such
20 that the information is then reflected in the trading prices.
21 An inefficient market is a market in which the information is
22 ignored, for whatever reason, or there is not a
23 developed-enough trading platform for people to trade on it, so
24 important news is ignored and therefore not represented in the
25 price. An efficient market is the opposite, where news is

H80AARC1ps

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1 quickly incorporated into the price that you observe and that
2 people trade on.

3 THE COURT: Is it a matter of degree or are these
4 absolutes?

5 THE WITNESS: It's a matter of degree. The literature
6 talks about a taxonomy of types of efficiency. A market can be
7 efficient with respect to some information but not other
8 information. A market could be perfectly efficient.

9 THE COURT: For example.

10 THE WITNESS: Pardon me?

11 THE COURT: For example.

12 THE WITNESS: Oh, for example, if -- well, for
13 example, the issue in this case, there's a severe announcement
14 made on October 29, 2014 that the company advises investors not
15 to rely on its financials. In an efficient market, that will
16 have an immediate and dramatic impact on the security prices,
17 and you can observe the security prices going down. If the
18 market were inefficient, maybe people wouldn't have heard about
19 the information, the news wouldn't cover it, analysts couldn't
20 be there to help people know about it. That's one reason a
21 market can be inefficient, because there's an impediment to
22 information flow. Or maybe people hear about it and know about
23 it and they're concerned about; they go to trade the security
24 and they can't, because they can't find it, it's not on an
25 exchange, there aren't market makers. So people have the

H80AARC1ps

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1 information; they can't trade. That's another example of an
2 inefficient market, where the price won't reflect the new
3 information because people simply can't trade on it. Or
4 another type of -- anyway, so an efficient market would be one
5 where the information does get incorporated because the market
6 is developed enough for the information to flow and people to
7 trade on it, and an inefficient market would be one where that
8 can't happen, as far as degrees, which I understand was your
9 question.

10 It's possible that the market is -- that the company
11 is obscure, to the extent -- obscure or smaller or there's a
12 flow-of-information impediment, such that people shrug off some
13 information but not all information.

14 THE COURT: OK.

15 Q. And, Dr. Feinstein, did you prepare a report that described
16 the work you did and the opinions that you reached from that
17 work?

18 A. Yes.

19 MS. WYMAN: Your Honor, if I might approach, I have a
20 notebooks of the exhibits that we're going to use today.

21 THE COURT: Yes.

22 MS. WYMAN: And here's a copy for the Court.

23 Q. I just handed you, Dr. Feinstein --

24 THE COURT: This is the same that was given to me in
25 the submissions, right?

H80AARC1ps

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1 MS. WYMAN: That report was in our moving brief, yes.

2 Q. In the notebook that I just gave you, Dr. Feinstein, under
3 tab 1 is marked Plaintiff's Exhibit 1, which is a document
4 that's called "Reports on Market Efficiencies, Professor Steven
5 P. Feinstein, Ph.D., CFA," dated March 15, 2017. Do you
6 recognize that document, Dr. Feinstein?

7 A. Yes.

8 Q. Can you identify it for me?

9 A. This is the report that I submitted in this matter.

10 Q. Is it a true and accurate copy of the report you tendered?

11 A. It is.

12 Q. And if you could look on page 76 of Plaintiff's Exhibit 1,
13 is that your signature?

14 A. Yes.

15 Q. And there are several appendices and exhibits attached to
16 your report. Is there a complete set of each of those in the
17 binder that I've handed to you?

18 A. Yes.

19 Q. After you tendered your report, did you have to make any
20 corrections to it?

21 A. I did.

22 Q. What did you have to correct?

23 A. There was an error in the construction of Exhibit 8A. The
24 data weren't lined up correctly.

25 Q. If you turn to tab 2 in the binder that I gave you, there

H80AARC1ps

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1 is a document that's entitled "Exhibit 8A, ARCP Common Stock
2 Regression Results."

3 A. Yes.

4 Q. Do you recognize that document?

5 A. I do.

6 Q. What is it?

7 A. It's the corrected exhibit, with the data lined up
8 correctly.

9 Q. Is it the true and correct copy of the corrections that you
10 made to Exhibit 8A?

11 A. Yes.

12 Q. Can you explain in more detail why it would be necessary to
13 correct Exhibit 8A?

14 A. Well, the prior exhibit didn't have the data presented
15 correctly. The third column wasn't lined up with the dates
16 that were corresponding in the first column. In the corrected
17 exhibit they line up.

18 Q. Did any of the corrections that you made to Exhibit 8A
19 impact any of your opinions that you gave in this case?

20 A. No, not at all. The error in the construction of Exhibit
21 8A was just a presentation error. It was nothing to do with
22 the computations in the analysis.

23 MS. WYMAN: Your Honor, plaintiff moves to Exhibits 1
24 and 2 into evidence.

25 MR. EDELMAN: No objection.

H80AARC1ps

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1 THE COURT: What exhibits?

2 MS. WYMAN: Exhibits 1 and 2.

3 THE COURT: Received.

4 (Plaintiff's Exhibits 1 and 2 received in evidence)

5 Q. Dr. Feinstein, in doing the work that you did in this
6 matter, did you follow methodologies that are generally
7 accepted in the area of finance and statics?

8 A. Yes.

9 Q. Did you also rely on published literature that that's
10 generally accepted in your field?

11 A. Yes.

12 THE COURT: Which is Exhibit 2?

13 MS. WYMAN: Exhibit 2 is under tab 2 in your binder,
14 your Honor. It's a correction to Exhibit 8A of Dr. Feinstein's
15 report.

16 THE COURT: OK. Thanks.

17 Q. Dr. Feinstein, what opinions did you reach concerning ARCP
18 common stock?

19 A. That it traded in an efficient market over the entire
20 course of the class period, from May 9, 2012 to October 29,
21 2014.

22 Q. And what opinions did you reach concerning ARCP's preferred
23 stock?

24 A. Essentially the same opinion. It too traded in an
25 efficient market over the portion of the class period after

H80AARC1ps

Feinstein - direct

1 which it was issued.

2 Q. And when was the ARCP preferred stock issued, if you can
3 recall?

4 A. February of 2014.

5 Q. What about ARCP bonds? Did you reach any opinions
6 concerning them?

7 A. The same opinion, that they traded efficiently over the
8 portion during which they traded.

9 Q. And how did you arrive at the opinions that you reached?

10 A. I ran a full and complete *Cammer* and *Krogman* analysis on
11 each of the securities.

12 Q. So you looked at each of the *Cammer* and *Krogman* factors,
13 and there are eight total?

14 A. That's right.

15 Q. Why is it important for you to look at those factors to
16 make a determination of market efficiency?

17 A. That's an important question. I just want to point out
18 that, although there doesn't seem to be any disagreement
19 between the experts on the evaluation of the *Cammer* and *Krogman*
20 factors save for the empirical factor, there is quite a bit of
21 disagreement about the importance of those factors in arriving
22 at a decision as to whether or not the market is efficient or
23 inefficient.

24 I believe they are very important factors, the
25 indicator factors, all of the factors, whereas my understanding

1 H80AARC1ps

2 Feinstein - direct

1 is, Dr. James believes it's only the empirical factor, but
2 he'll talk about that.

3 So the reason why that's the appropriate --

4 THE COURT: What's the empirical factor?

5 THE WITNESS: A demonstration of a cause-and-effect
6 relationship between information and movement in the stock
7 price.

8 So most of the factors, seven of the eight factors,
9 are evaluations of characteristics of the market, for example,
10 is there high volume or is there low volume, are there analysts
11 covering the firm, are there no analysts covering the firm, is
12 it traded on an exchange, is it not traded on an exchange, are
13 there market makers facilitating trading or it's difficult to
14 find a market maker to facilitate trading. Those are the sort
15 of factors that are indicator factors that tell you about the
16 structure of the market.

17 The empirical factor, the way I see it is the icing on
18 the cake. After we've made an evaluation of the other factors,
19 it's a demonstration of the security prices behaving
20 efficiently.

21 Q. And Dr. Feinstein, do your opinions rely on a holistic view
22 of all the factors that you looked at?

23 A. Yes.

24 Also, I just want to add that I believe that it's
25 important to note that the reason why, in virtually every

H80AARC1ps

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1 securities case, analysts look at all the *Krogman* factors and
2 *Cammer* factors, it's not just because courts have accepted this
3 as reliable evidence and it's not just because there's
4 empirical published research that says these are valid
5 indicators that separate efficient from inefficient companies
6 and events. It's because the factors directly address the
7 potential defects that might be in the market that could be
8 causes for inefficiency.

9 So because one cause of inefficiency, for example, is
10 that you can't find the stock to trade it, the *Cammer* factor
11 that there are market makers or that the stock is traded on an
12 exchange addresses that. In this case, there were definitely
13 market makers that facilitated the trading of all of these
14 securities. So that potential reason for inefficiency isn't
15 there.

16 Another potential reason, as I mentioned before, is
17 that the company might be obscure and therefore unknown and
18 therefore new information comes out but nobody cares about that
19 information. That would cause the market to be inefficient.
20 Well, the volume factor addresses that. The volume factor, you
21 can look at it and see, is there active trading in the stock or
22 is there active trading in the bonds, is there active trading
23 in the preferred stock. If there is, you know that the company
24 is not so obscure that people are ignoring it. And in this
25 case those securities definitely satisfied, to a very high

H80AARC1ps

Feinstein - direct

1 degree, that volume factor.

2 If I may just -- analyst coverage is another factor.

3 It addresses, does information get out? Is there logistics for

4 the information being disseminated and for the information to

5 be processed and for investors to get help understanding the

6 meaning of the information? Without analysts, someone might

7 say no, and that could be a potential cause of inefficiency.

8 But with analysts, you know that that's not going to happen.

9 That defect is not present. And in this market, over the

10 course of the class period, there were always at least two --

11 there were always at least two analysts covering the stock and

12 the company, and there were by my count as many as 45 over the

13 course of the class period.

14 Q. Is that enough to satisfy that *Cammer* factor that deals

15 with analyst coverage?

16 A. Yes.

17 Q. And I think you mentioned trading volume. Did you study

18 ARCP trading volume for each of the securities you looked at?

19 A. I did.

20 Q. What did you find?

21 A. It was very high. For the stock, if you look at the

22 average over the course of the class period, it's close to 9

23 percent weekly turnover. In other cases, in fact in the

24 seminal, landmark *Cammer* case, commentators offered that 1 to 2

25 percent weekly turnover would be considered active trading.

H80AARC1ps

Feinstein - direct

1 This is 9 percent, which is far above the threshold. The
2 preferred stock was at 5 percent, which is well over the
3 threshold. The bonds, it's very interesting in this case that
4 bonds typically trade infrequently. That's what the literature
5 says and it's the nature of bonds that they typically trade
6 infrequently but in large blocks. In this particular case,
7 even the bonds satisfy what is a threshold level of active
8 trading, when that threshold is determined based on other
9 stocks. So the bonds all had more than 1 to 2 and sometimes
10 had far greater than 2 percent weekly turnover.

11 Again, I just want to add one more thing, that even
12 looking at the earliest portion of the class period, which is,
13 defense counsel pointed out, was going to be the emphasis of
14 their challenge, there was active trading in the stock. So
15 even in the earliest period, when the company was at its
16 smallest, there was very active trading in the stock, that
17 indicated that, even then, this was not an obscure company
18 escaping the notice of investors.

19 Q. And I think that you mentioned too that you looked at the
20 market makers that were making markets in the ARCP securities
21 you looked at. Did I remember that right?

22 A. That's right.

23 Q. And did you find that there were sufficient market makers
24 for each of the securities to satisfy you that that *Cammer*
25 factor had been met?

H80AARC1ps

Feinstein - direct

1 A. I did.

2 The preferred stock and the common stock were listed
3 on NASDAQ. The bonds are traded over the counter. They had 11
4 underwriters. Underwriters typically make a market
5 subsequently in the bonds. And as well, the very frequent and
6 active trading of the bonds indicates that there is no
7 impediment, there was no impediment, to the trading of the
8 bonds.

9 THE COURT: Did the bonds have convertible features?

10 THE WITNESS: Two of them did. The TAA and TAB bonds
11 were convertible senior notes.

12 THE COURT: Into what?

13 MS. WYMAN: Into the stock.

14 THE COURT: Into stock.

15 And the preferred?

16 THE WITNESS: The preferred had a fixed dividend. I
17 don't believe it was convertible into the common.

18 Q. So you've looked at, we've gone through *Cammer* factor one,
19 which is the trading volume; *Cammer* factor two, which is
20 analysts; *Cammer* factor three, which is market makers. What's
21 the fourth *Cammer* factor that you looked at?

22 A. S-3 registration eligibility.

23 Q. Why is that important?

24 A. It's really one of the more unusual factors, but the SEC
25 allows for companies that are well known, established, that

H80AARC1ps

Feinstein - direct

1 meet certain criteria, to issue secondary offerings, issue
2 stock and securities, in an expedited manner. And the question
3 is, it's been offered as evidence of market efficiency because
4 if a company is well known enough, large enough, and has a
5 history of financial filings such that it's eligible for SEC
6 S-3 and S-4 registrations, then there is an inference that it
7 would also -- those same characteristics would promote and
8 engender market efficiency.

9 Q. Did you find that that *Cammer* factor was satisfied for the
10 securities you studied?

11 A. Not over the entire class period, for two reasons.

12 Q. Which security are you speaking of?

13 A. Just the common. So for the preferred and the bonds, the
14 S-3 eligibility factor was satisfied everywhere, throughout
15 the -- everywhere since from the time they were issued to the
16 end of the class period.

17 For the common, at the earliest stage, right after,
18 right after the IPO and then right after the beginning of the
19 class period, there wasn't yet a year's worth of filings to
20 allow S-3 eligibility. And right around the beginning of the
21 class period, I believe one month after the start of the class
22 period, for the first month of the class period, they didn't
23 have the \$75 million float criterion satisfied. But I
24 investigated to determine whether that was a concern or not.

25 Q. And what did you find out?

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Feinstein - direct

1 A. Well, one thing is that as soon as they were eligible, on
2 August 1, 2012, they not only were eligible, but they did
3 immediately file S-3. So there's an August 1, 2012
4 eligibility.

5 But if the factors are about the availability, I mean,
6 the factors underlying S-3 eligibility, are about availability
7 of financial data to the marketplace and whether the company is
8 big enough to be not obscure, in their IPO they submitted years
9 of prior financials and pro forma financials, and from the IPO
10 through August 2012, they supplemented that with additional
11 filings. So the financial data was available.

12 And as far as the size, I looked at -- I was
13 concerned. I mean, was this company obscure or was it not
14 obscure in that early part of the class period. I determined
15 it was not obscure. There were over 200 news articles about
16 ARCP over that period, when they were not eligible for S-3
17 filing.

18 THE COURT: What was the period?

19 THE WITNESS: Of the 200 articles? From the IPO
20 period to June of 2012, which is the -- after June of 2012,
21 they were over \$75 million a quote.

22 THE COURT: So the only uncertainty you have is one
23 month.

24 THE WITNESS: That's right.

25 THE COURT: The first month, May.

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Feinstein - direct

1 THE WITNESS: Right.

2 Q. Did you satisfy yourself that there was enough information
3 available to you to analyze whether or not the market or that
4 Cammer factor was neutral to your analysis or satisfied based
5 on other information that was available to you?

6 A. That's, that's what I'm saying, yes.

7 Q. And so is your conclusion, then, that given all the
8 information that you looked at with regard to the common stock
9 in that early period, that you feel that the Cammer factor four
10 is satisfied with regard to the stock in that short time
11 period?

12 A. That's right.

13 There's just one more thing I wanted to say about
14 that, which is that the reason why there were so many news
15 articles about this company and why it was not obscure, even in
16 its early phase, is because management, Mr. Schorsch, was well
17 known in this field and had very large nontraded REITs
18 available and had a team of staff of many, many brokers and
19 dealers essentially marketing and publicizing the other
20 investments. He's a very well-known person in this space.
21 Therefore, when he started a publicly traded option, it gained
22 a lot of notoriety, a lot of coverage. It was not obscure at
23 all.

24 Q. And then the other factors that you've looked at were what?
25 Can you identify them?

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Feinstein - direct

1 A. So those first four factors that we talked about are the
2 first four *Cammer* factors. The fifth one we'll get to next. I
3 mean, it's the area where there's the most contention here, is
4 the empirical factor, demonstration of a cause-and-effect
5 relationship. But some courts have gone beyond the *Cammer*
6 factors and looked at three additional factors, which are
7 called the *Krogman* or *Unger* factors.

8 THE COURT: Stay away from "courts." The word we're
9 talking about is "economics."

10 THE WITNESS: OK. So the other factors are bid-ask
11 spread.

12 THE COURT: That's my job. "Courts" are my job.
13 "Economics," your job.

14 Q. What are the other factors?

15 A. First one, bid-ask spread.

16 Q. What's a bid-ask spread?

17 A. A bid-ask spread is essentially the fee that market makers
18 charge. It's the spread between what they will pay for a
19 security and what they will charge you for a security. So if
20 you buy and sell from a market maker, you basically pay them a
21 full bid-ask spread.

22 Q. Why is that important to know when you're assessing the
23 efficiency of a market?

24 A. If it's very wide, it means it's expensive to trade the
25 security. And if it's expensive to trade the security, then

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1 people might choose not to trade even when they have important
2 information. So that is another reason why a market could be
3 inefficient.

4 Q. Were you able to determine the bid-ask spread for each of
5 the securities you studied?

6 A. The -- definitely for the common stock I had the bid-ask
7 spread.

8 Q. And was it sufficiently narrow that you were satisfied that
9 that factor was confirmed?

10 A. Yes. And --

11 Q. What about the preferred stock?

12 A. Same thing. It was not only -- it was far narrower than
13 the average for all other publicly traded stocks on American
14 exchanges. That holds for both the common and the preferred.

15 Q. And what about ARCP bonds?

16 THE COURT: Can you give some specific examples.

17 THE WITNESS: Yes.

18 THE COURT: Ms. Wyman.

19 MS. WYMAN: Yes. I can inquire.

20 Q. Dr. Feinstein, could you tell us what the bid-ask spread
21 was for ARCP's common stock that you calculated.

22 A. This would be, the section is on page 28 of my report. The
23 data are provided in paragraph 106.

24 THE COURT: What did you look at, the pink sheets?

25 THE WITNESS: No. No, no, it's a NASDAQ traded stock.

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Feinstein - direct

1 So it's CRSP, the Center for Research in Security Prices at the
2 University of Chicago, has that data. And I got that data and
3 examined that data.

4 THE COURT: What does it do, list the bid and the ask?

5 THE WITNESS: Each day.

6 THE COURT: Once each day.

7 THE WITNESS: Well, I believe there's -- I used
8 end-of-day data, but I believe it gives the bids and asks
9 throughout the course of each day.

10 There's TAQ data that we got. It's called trade end
11 quote data. And that data lists bids and asks, but it also has
12 bids and asks at the end of the day. And I averaged end-of-day
13 bids and asks.

14 THE COURT: Are these bids and asks that are posted by
15 market makers, or are they the actual bids and asks in trading
16 that day?

17 THE WITNESS: Well, both. It's both. That's how the
18 NASDAQ market works. They, market makers posts their bids and
19 asks, and then there are electronic media that consolidate all
20 the market makers' bids and asks so that you can see the inside
21 bid and ask, which is the best bid and the best ask, and that's
22 what's reported in the data.

23 THE COURT: What's the inside bid and ask?

24 THE WITNESS: That would be the highest bid and the
25 lowest ask. So if you were selling your stock, you would want

H80AARC1ps

Feinstein - direct

1 the highest bid. That would be most relevant bid for you. If
2 you were buying the stock, you would want the lowest ask. So
3 that data is available from CRSP.

4 THE COURT: Is there a conventional average on the
5 market for bids and asks, in terms of spread?

6 THE WITNESS: Yes. I have that in paragraph 106.

7 So I did the analysis over the entire class period for
8 all other stocks in the CRSP database. "CRSP" stands for the
9 Center for Research in Security Prices. They're the provider
10 of this database. It was 0.7 percent for all stocks traded on
11 American exchanges. So 0.7 percent over that period.

12 For the common stock of ARCP, over the same period, it
13 was 0.18 percent. So less than a third as wide. So that tells
14 you it's an actively traded stock that could be traded very
15 economically.

16 The preferred stock --

17 THE COURT: And there's competition among buyers and
18 sellers.

19 THE WITNESS: Exactly right.

20 THE COURT: Which tends to close the spread.

21 THE WITNESS: That's exactly right.

22 Q. And did you do the same analysis for the preferred stock,
23 Dr. Feinstein?

24 A. Yes.

25 THE COURT: So the preferred was issued -- when was

H80AARC1ps

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1 the preferred issued for the first time?

2 THE WITNESS: That was in February of 2014.

3 Q. Dr. Feinstein, I will direct you to paragraph 1485 of your
4 report on page 48.

5 A. I'm sorry. It's January. I was off by a month. It's
6 January 6, 2014, is when the preferred was issued.

7 Actually, it was issued on January 3, 2014, in
8 conjunction with one of the mergers that -- or acquisitions
9 that took place then. But it began --

10 THE COURT: Was the preferred issued in the ARCT
11 merger?

12 THE WITNESS: Yes.

13 THE COURT: In July of 2013?

14 THE WITNESS: No. January 6th of 2014 is the CapLease
15 and ARCT IV acquisition. CapLease and ARCT IV is --

16 THE COURT: "ARCT IV" is A-R-C-T.

17 THE WITNESS: Yes, A-R-C-T IV. So it's not the ARCT
18 III acquisition. It's the ARCT IV acquisition. And just
19 before that, to raise the money for that is when the preferred
20 was issued.

21 So it's January 6, 2014, is when it began trading.
22 And I looked at the bid-ask spread for the entire period from
23 January 6, 2014 through the end of the class period.

24 Q. And what was your conclusion?

25 A. It's on page 54 of my report. The average bid-ask spread

H80AARC1ps

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1 was 0.15 percent, far below the average for the overall market
2 for other stocks that traded in the overall market.

3 Q. And were you also able to compute the bid-ask spread for
4 ARCP's bonds?

5 A. No.

6 Q. Why not?

7 A. That type of data is generally not available for the bonds.

8 Q. Is that specific to ARCP or is that generally true for
9 corporate bonds?

10 A. Generally true for corporate bonds.

11 Q. Did you do anything else to satisfy this particular factor
12 concerning the bonds?

13 A. I did.

14 So there wasn't -- I couldn't evaluate that particular
15 factor for the bonds. But I was able to see the volume. And
16 there's overlap between the importance and implications of each
17 of these factors. These bonds traded extraordinarily actively
18 and extraordinarily frequently, not only in comparison to
19 stocks, but in comparison -- or not only in comparison to other
20 bonds but even in comparison on the standards of stocks.

21 So seeing how frequently these bonds traded told me
22 that there was no impediment to investors keeping them from
23 being able to buy and sell these particular bonds.

24 I just want to mention that the analysis I did there
25 is based on work by a researcher named Mohanty, who looked at

H80AARC1ps

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1 how frequently bonds trade, not just what the --

2 THE COURT: How do you find out the frequency of
3 trading of bonds?

4 THE WITNESS: Well, these particular bonds were --
5 this data is available. This data is available from FINRA.
6 FINRA collects data on trades, and that data then is made
7 available to researchers who request it. I requested it from
8 counsel and counsel, I understand, got it from FINRA.

9 THE COURT: And what's the methodology of collection?
10 How is it collected? Information, etc.

11 THE WITNESS: The FINRA rules are that FINRA members,
12 who are the market makers who make the market in those bonds,
13 have to report their trades, the prices and the volumes, to
14 FINRA, and then FINRA collects and maintains --

15 THE COURT: Each day?

16 THE WITNESS: Yes. Each trade. Each trade.

17 So what I was able to see is that whereas, according
18 to the Mohanty --

19 THE COURT: You could actually trace all the trades of
20 the bonds, everything that was reported.

21 THE WITNESS: Right.

22 THE COURT: And it's an obligation to report.

23 THE WITNESS: That's right.

24 THE COURT: And from that you could determine -- how
25 do you determine the spreads?

H80AARC1ps

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1 THE WITNESS: Well, I couldn't. I couldn't.

2 THE COURT: You could only see the trades.

3 THE WITNESS: The trades and the prices. The volumes
4 and the prices, but not the bids and the asks.

5 THE COURT: So what did you do in analyzing the trades
6 to come to your opinion that there was efficiency with regard
7 to this factor?

8 THE WITNESS: Well, specifically with regard to bid
9 and ask, I report that I could not.

10 THE COURT: Well, bid and ask, there is no bid and ask
11 of bonds. All you have is price and volume.

12 THE WITNESS: Right.

13 THE COURT: Right?

14 THE WITNESS: So I conducted a Mohanty study. A
15 Mohanty study looks at how much time is there between trades.
16 So typically the research, the literature on bonds is that
17 bonds trade infrequently but in very large blocks. So one
18 institution might move \$100 million of their holdings or \$50
19 million of their holdings, but they're not going to do that
20 every day. They'll do it from time to time. So typically for
21 corporate bonds you see very large trades but very
22 infrequently. Many days will pass between one trade and the
23 next.

24 That was not the case with the ARCP bonds. They
25 traded many times a day on average. There were some days when

H80AARC1ps

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1 there was no trading. But I calculated the average time
2 between trades and it was less than a day. So on average, they
3 traded every -- on average, I mean, using that metric, they
4 traded very frequently and more than once a day.

5 So I was able to do a lot of work with that data. I
6 was able to then later do an event study with that data.
7 Whereas typically with bonds you can't do an event study.
8 Because these bonds traded so extraordinarily actively, I was
9 able to examine, do more empirical work with those bonds.

10 Q. You mentioned that you did a Mohanty study. Is that the
11 generally accepted way to figure out whether the bid-ask spread
12 component of a market efficiency analysis is met when you are
13 dealing with bonds?

14 A. No. That's -- it's -- no. I could not do the bid-ask
15 spread evaluation for the bonds because I didn't have that
16 data, so instead I looked at the Mohanty work and did a Mohanty
17 study to see -- to answer the same question: was there an
18 impediment to the trading of the bonds. And I found there was
19 no impediment to the trading of the bonds.

20 THE COURT: The point is that the more frequent the
21 trade, the closer the range in stock prices, the more efficient
22 the market.

23 THE WITNESS: Yes, I would say that. I would say that
24 it is --

25 THE COURT: There is a lot of opportunity to trade.

H80AARC1ps

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1 THE WITNESS: Yes.

2 THE COURT: A lot of people willing to buy and sell.

3 THE WITNESS: Right.

4 THE COURT: An open market, available market.

5 THE WITNESS: Right.

6 THE COURT: There is not a terrible amount of price
7 fluctuation between trades.

8 THE WITNESS: OK. I mean, there -- that's reasonable.

9 THE COURT: Why is that the case?

10 THE WITNESS: If there's active trading, then -- the
11 way the over-the-counter bond market works is that if an
12 institution wants to buy a bond, it's an over-the-counter
13 market, so they'll either use the telephone or they'll use
14 other platforms to survey three or so market makers and find
15 out what the bond is being offered for. If the bond is
16 actively traded, that information becomes available through
17 this kind of surveying of market makers. So the more active
18 trading there is, the better you can shop around for the bond
19 if you're trying to buy the bond and get a better price.

20 THE COURT: And the less the volatility. There's a
21 lesser fluctuation.

22 THE WITNESS: I have to admit I didn't evaluate that
23 specifically, but it sounds -- you're -- the inference is
24 reasonable.

25 THE COURT: So what did you look at? You looked at

H80AARC1ps

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1 prices and volume. The volume tells you that there were a fair
2 number of market makers. There's a ready market to buy and
3 sell.

4 THE WITNESS: Right.

5 THE COURT: But you didn't do any analysis of what the
6 prices might mean, in terms of market efficiency.

7 THE WITNESS: Well, I did. I mean, for the -- I did
8 do an event study on the bonds to see how it responded to the
9 October 29 information. That I was able to do. And I did a
10 regression analysis to see what the relationship is between
11 movements --

12 THE COURT: We haven't gotten to that. Ms. Wyman can
13 elicit that information when she gets to it.

14 Q. So with regard to the bonds, you were able to study the
15 frequency with which they traded instead of determining the
16 bid-ask spread. Is that right?

17 A. That's right.

18 Q. And are you satisfied that the frequency that you
19 calculated is indicative of a market where the bond was
20 available to trade if someone wanted to?

21 A. Yes.

22 Q. And then the last factors are, what?

23 A. Size, in terms of market capitalization, meaning, for
24 stock, it's the total number of shares outstanding times the
25 price of the stock, so the total value of the outstanding

H80AARC1ps

Feinstein - direct

1 issue. Most people call that number the market capitalization
2 of the company.

3 Q. And is that something you looked at with regard to the
4 stocks?

5 A. Yes.

6 Q. Did ARCP's business grow during the class period?

7 A. It did.

8 Q. How did you account for that during your analysis of the
9 market capitalization factor?

10 A. Well, I looked at different periods. I looked at an
11 average over the entire class period. I looked at an average
12 over essentially the first half of the class period versus the
13 second half of the class period. And then in response to
14 Dr. James' work, I looked at the earliest period as well to see
15 what the market cap was even in the earliest period -- portion
16 of the class period.

17 Q. How do you decide to divide the class period? On what
18 basis did you make that decision?

19 A. Well, the reason I divided the class period is I
20 anticipated there might be some concern about the growth of the
21 company over time. So I observed that analysts said that a
22 major break, a major change in the nature of this company came
23 in August of 2012, with the announcement of an event called
24 internalization. Until -- in the earlier part of the class
25 period, the company had, I believe, no employees. I mean, they

H80AARC1ps

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1 subcontracted externally for the management of the company.
2 And that was a concern that potential investors had regarding
3 just how the company was managed and regarding whether -- it
4 was a concern that some analysts pointed out could make it
5 difficult for the company to acquire other REITs and other,
6 other businesses. But with internalization, that concern
7 disappeared. And so that announcement of internalization was
8 in August of 2012 --

9 THE COURT: "Internalization" means -- it's the
10 management?

11 THE WITNESS: The management, that they took the
12 management from being subcontracted to an outside firm, an
13 outside Schorsch-controlled form, to inside ARCP.

14 And it just so happens that that was approximately
15 right at midpoint of the class period.

16 Q. I think you said August 2012. Are you sure that that's the
17 year that that happened?

18 A. No. It's August 2013. I misspoke.

19 Q. So the first part of the -- the first interval that you
20 looked at was from May 9, 2012 to August?

21 A. 2 thousand -- August 20 -- August 19, 2013.

22 Q. So you looked at the market cap metric during that period
23 separately from the entire class period, right?

24 A. Yes.

25 Q. And what did you find when you looked at it in that period?

H80AARC1ps

Feinstein - direct

1 A. On average over that period it was extraordinarily high.

2 Q. And then did you subsequently --

3 THE COURT: What was extraordinarily high?

4 THE WITNESS: The market cap, the total outstanding --
5 the average of the total outstanding value of the stock and the
6 preferred --

7 THE COURT: Over what period?

8 THE WITNESS: May 9, 2012 to August 19, 2013.

9 THE COURT: And you say that was extraordinarily high?

10 THE WITNESS: Yes.

11 THE COURT: In relationship to what?

12 THE WITNESS: Other stocks, other publicly traded
13 companies.

14 THE COURT: It had a high capitalization.

15 THE WITNESS: Correct. It was on average big.

16 THE COURT: And after August 19, 2013, capitalization
17 was even higher?

18 THE WITNESS: I'm sorry. Pardon?

19 THE COURT: After it was even higher?

20 THE WITNESS: Even higher, that's right.

21 THE COURT: It was high on both sides.

22 THE WITNESS: That's right.

23 THE COURT: High before August 19, 2013 and high
24 afterwards.

25 THE WITNESS: On average.

H80AARC1ps

Feinstein - direct

1 THE COURT: On average.

2 Q. And did you satisfy yourself --

3 THE COURT: "Average" meaning average versus the
4 average of all stocks, all publicly traded stocks?

5 THE WITNESS: No, "average" meaning the average across
6 each day in the period.

7 Q. So how did you calculate the average that you're talking
8 about?

9 A. I measured the market capitalization each day, added them,
10 and divided by the number of days.

11 Q. And did you satisfy yourself, in doing that exercise, that
12 that factor was met for the common stock during the full class
13 period plus the two intervals that you identified?

14 A. Yes.

15 Q. And did you do the same exercise for the preferred stock?

16 A. Yes.

17 Q. And did you have to divide the preferred stock analysis
18 into intervals as well?

19 A. No, because of when it was issued.

20 Q. And what was your conclusion concerning the preferred stock
21 market capitalization?

22 A. It's on page 53 of my report. It was high. It was close
23 to a billion dollars. It was, the average is, I'm reading from
24 paragraph 205, it's \$988.6 million. And what's interesting
25 about that number is, even if that were the only securities

H80AARC1ps

Feinstein - direct

1 that ARCP had ever issued, even if there were no bonds and if
2 there were no common stock, that \$988.6 million would place the
3 company in the top fifth decile relative to all other companies
4 in the United States ranked by size, which means it would be --
5 more than 50 percent of other companies would be less than even
6 that number alone.

7 Q. And in your opinion that was enough, their market
8 capitalization was enough to satisfy that factor?

9 THE COURT: Why don't you just move into the cause and
10 effect or the empirical factor if that's the one at issue.

11 MS. WYMAN: Sure.

12 THE COURT: I actually want to hear what Dr. Feinstein
13 says on this, and then I want to turn the podium over to
14 Mr. Edelman.

15 Q. In analyzing *Cammer* factor five, Dr. Feinstein, what did
16 you do concerning that factor with the common stock?

17 THE COURT: He said, he took it on the period of the
18 end of the class period, October 29, 2014. Right?

19 THE WITNESS: Well, I did a -- that was one of the
20 tests I did.

21 THE COURT: What other tests did you do?

22 THE WITNESS: The other test is a collective-event
23 test. A collective-event test identifies, using a screen, days
24 on which one would reasonably believe there was a higher flow
25 of information to the market about that stock. And based on my

H80AARC1ps

Feinstein - direct

1 screen, I came up with 45 such days. Then I ran tests to
2 compare those 45 days, where there was reasonably a greater
3 flow of information to the market, to all other days in the
4 class period and also other portions of the class period. And
5 the experiments, the statistical tests, seek to determine
6 whether the price dynamics among the news events are different
7 from the price dynamics in the more typical days, because if
8 there is a greater significance -- a greater incidence of
9 significant days in the news events than typically among all
10 other days, that is a demonstration that the stock is reacting
11 to news. So I analyzed 45 days. If there was a greater
12 frequency of significant days among those 45 and the division
13 between the 45 and the other days is on the basis of
14 information flow, you now know that information flow matters.
15 You now know that information is reaching the marketplace and
16 the market is reacting to it.

17 So that was one test. That's called the Z test. And
18 I did find that there was a statistically significantly higher
19 incidence rate of significant days among the news days than the
20 non-news days.

21 Q. Did you study that over the course of the entire class
22 period?

23 A. Yes.

24 THE COURT: Is there a table in your report that
25 depicts what you found? Tab what?

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Feinstein - direct

1 THE WITNESS: Page 206, tab 10.

2 THE COURT: Tab 10?

3 THE WITNESS: Tab 10.

4 So -- are you there?

5 THE COURT: Yes.

6 THE WITNESS: OK. So in the far right column are the
7 results for the entire class period. There were 623 days in
8 the entire class period. Of those, 41 are statistically
9 significant.

10 THE COURT: What does that mean?

11 THE WITNESS: "Statistically significant" means the
12 stock price movement was severe, either up or down, that it was
13 a big movement, such that it would be rare for a movement like
14 that to happen on the basis of random volatility alone. That's
15 what "statistical significance" means.

16 THE COURT: And did you find some cause to that
17 movement?

18 THE WITNESS: Yes. That's actually, in fact, what the
19 study shows. Because we could see that -- see the number 26.67
20 percent. Of the 45 news days, 26.67 percent were statistically
21 significant, but of the non-news days, only 5.02 percent, which
22 is the typical rate for typical days, were statistically
23 significant, and that tells you that the incidence of
24 statistical significance is five times greater among the news
25 days, on days when there's a larger flow of news, than on days

H80AARC1ps

Feinstein - direct

1 when there's a lesser flow of news, which is a demonstration
2 that this market cares about news.

3 THE COURT: OK. I think you've covered it. Right,
4 Ms. Wyman?

5 MS. WYMAN: Well, he actually did several more tests
6 on -- statistical tests on the common stock, and he did tests
7 on the preferred and the bonds, which he can describe to you.

8 THE COURT: Go ahead.

9 Q. And so you did this collective-event study and you found
10 that on --

11 THE COURT: Don't repeat. This is the common stock.
12 What did you do for the preferred? Is there another table
13 showing what happened with the preferred stock?

14 THE WITNESS: For the preferred I ran only the event
15 study on October 29, 2014.

16 THE COURT: And what happened to the preferred that
17 day? Dramatic movement?

18 THE WITNESS: Yes. It fell significantly.

19 THE COURT: How about, what other equities were
20 involved?

21 MS. WYMAN: There were no other equities. It was
22 bonds.

23 THE COURT: Bonds.

24 A. I was able to run the event study. I had another data.
25 There was enough trading on the bonds.

H80AARC1ps

Feinstein - direct

1 THE COURT: The bonds fell too?

2 THE WITNESS: They fell significantly.

3 Q. And Dr. Feinstein, why didn't you do the collective-event
4 study on the preferred and the bonds?

5 A. The nature of a collective-event study is, you're not
6 screening the data on the basis of should -- is the news so
7 severe that it should cause a statistically significant drop.
8 It's a much more objective screen, that just tries to identify
9 on which days was there a greater news flow. And for the most
10 part the greater news flow for this company was not so dramatic
11 over the course of the class period that it would affect, in a
12 significant way, bonds or preferred stock, because bonds and
13 preferred stock are both designed to be stable. So when there
14 was -- it might be important news that was disclosed, but
15 generally the kind of news that would move a stock in a
16 statistically -- a common stock in a statistically significant
17 manner wouldn't move a bond or a preferred stock in a
18 statistically significant manner, unless it's some blockbuster
19 news like what came out on the disclosure.

20 THE COURT: So what came out here? Was there
21 movement?

22 THE WITNESS: On the last day there was.

23 THE COURT: Only on the last day.

24 THE WITNESS: Well, that's the only test.

25 THE COURT: What about the bonds?

H80AARC1ps

Feinstein - direct

1 THE WITNESS: Same thing. They fell significantly in
2 response to the October disclosures.

3 THE COURT: So what about the other 44 news events
4 that affected the common stock, according to your analysis?

5 THE WITNESS: I didn't subject the other securities to
6 that same test.

7 THE COURT: Why not?

8 THE WITNESS: Because the kind of information would
9 not, just based on valuation principles, would not --

10 THE COURT: You expected it would not result in a
11 price movement, so why look.

12 THE WITNESS: That's right.

13 THE COURT: OK. Cross-examination.

14 THE WITNESS: Could I just make clear that it's based
15 on principles you wouldn't expect it to. It shouldn't
16 necessarily cause a price movement, not that I didn't think it
17 would.

18 THE COURT: You didn't think there wouldn't be any
19 movement, and you didn't look.

20 THE WITNESS: Right. Under an efficient market it's
21 not compelled that there should be a movement.

22 THE COURT: You explained it.

23 THE WITNESS: OK.

24 THE COURT: Those kinds of securities don't move as
25 much.

H80AARC1ps

Feinstein - cross

1 THE WITNESS: Right.

2 THE COURT: Realistically they only move if the
3 dividend is in jeopardy --

4 THE WITNESS: That's right.

5 THE COURT: -- or if the maturity level of the bond
6 and the ability to pay, the maturity, to pay interest along the
7 way is in jeopardy.

8 THE WITNESS: That's correct.

9 THE COURT: That's a different analysis.

10 OK, Mr. Edelman.

11 CROSS-EXAMINATION

12 BY MR. EDELMAN:

13 Q. Dr. Feinstein, Judge Hellerstein asked you about the
14 definition of market efficiency. Do you recall that?

15 A. Yes.

16 Q. And he asked you whether it was relative. Do you recall
17 that?

18 A. Yes.

19 Q. And you answered in terms of how much information gets
20 ignored or not ignored. Right?

21 A. Right, that there are degrees of efficiency and the degrees
22 would relate to exactly what you said. Sure.

23 Q. But, sir, you agree that the definition of market
24 efficiency is that an efficient market rapidly incorporates
25 into the price of a security all -- and I emphasize "all" --

H80AARC1ps

Feinstein - cross

1 publicly available information. Correct?

2 A. That's the ideal. That's, that's --

3 Q. Well, that's the way you defined it, sir. Correct?

4 A. That's the way I define the ideal, and I remember we went
5 over this in the deposition. That would be called perfect
6 efficiency.

7 Q. Sir, the way you defined market efficiency in your expert
8 report was that you used the word "all" public information.

9 Right?

10 A. Correct.

11 Q. And you agreed at your deposition that "all," in the
12 economic literature, means all, not some. Right?

13 A. Yes.

14 Q. And if you turn to page 13 to 14 of your expert report, you
15 provided some definitions of an efficient market, and, for
16 instance, you cited Professor Fama at the bottom of page 13 and
17 you provided a definition there from Professor Fama, who you
18 sited to me as an expert in this area. Correct?

19 A. Yes.

20 Q. And his definition was, "A market in which prices always
21 'fully reflect' available information is called 'efficient.'"
22 correct?

23 A. Yes.

24 Q. And that's your report and you used that definition, and it
25 includes the word "always." Right?

H80AARC1ps

Feinstein - cross

1 A. Yes. But I want to point out that the very next sentence
2 of my report says, "Professor Fama elaborated and refined his
3 definition in the *Halliburton II* amicus curiae that he
4 coauthored."

5 THE COURT: I don't know where we'll go with this,
6 Mr. Edelman. It's not an absolute. I don't understand an
7 efficient market as an absolute concept.

8 MR. EDELMAN: Well, your Honor --

9 THE COURT: I know, I see that Fama says "always fully
10 reflect available information."

11 MR. EDELMAN: And, your Honor, I would point out that
12 Dr. Feinstein also included in paragraph of 50 a quotation from
13 the *Amgen* Supreme Court case that also makes clear that an
14 efficient market will reflect all publicly available
15 information about a company. And that was included.

16 Q. And that was included in your report from the *Amgen* case,
17 right?

18 THE COURT: I don't think legally I'm required to
19 reserve for the definition of "efficiency" to the markets that
20 are a hundred percent efficient. There's no such thing as
21 perfection. Not in economics. Certainly not in judging.

22 Q. But you agree that when economists study market efficiency,
23 they're not looking just for a market that sometimes gets
24 public information and sometimes doesn't. They're looking for
25 something that always, or -- perfection is elusive -- almost

H80AARC1ps

Feinstein - cross

1 always incorporates public information. Correct? That's the
2 economic definition. Correct?

3 A. I would defer to what Professor Fama wrote that I quote in
4 paragraph 48: "Economists do not generally disagree about
5 whether market prices respond to new material information."
6 And so I think that's the level of perfection that is the
7 consensus in the profession.

8 THE COURT: As Daniel Kahneman points out in his book,
9 if a market were fully efficient, no one would buy and no one
10 would sell, because the market would always reflect the full
11 expectations of everyone. So there always has to be a level of
12 inefficiency that's perceived in order to motivate a buyer to
13 sell a stock, in order to motivate a seller to buy a stock.

14 (Continued on next page)

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H805arc2

Feinstein - cross

1 BY MR. EDELMAN: (Continuing)

2 Q. Now, you were also asked about the significance of the
3 fifth Cammer factor in the event study; correct?

4 A. Yes.

5 Q. And I heard you testify here that that factor, you view as,
6 you said, icing on the cake, correct?

7 A. That's right.

8 Q. But the fact is that in your expert report you
9 characterized it quite differently, correct?

10 A. I don't believe so. I pointed out that it was a unique
11 factor because it is a demonstration of market efficiency and
12 that it is special for that reason. I wouldn't discount icing
13 on the cake.

14 Q. You didn't use the phrase "icing on the cake" in your
15 expert report, right?

16 A. Correct.

17 Q. If you turn to paragraph 109 of your report you stated: Of
18 the five Cammer factors, the empirical factor was cited by the
19 Cammer Court as one of the most convincing ways to demonstrate
20 efficiency, correct?

21 A. Yes. And they're right, because once you've looked at the
22 other factors, to see a demonstration of the market behaving
23 efficiently would be very convincing.

24 Q. And in fact you wrote, affirmatively, when you put in your
25 expert report that, in paragraph 110, second line: The

H805arc2

Feinstein - cross

1 empirical factor focuses on the essence of market efficiency as
2 the other four factors are indicators that generally signal
3 market efficiency, correct?

4 A. That's right.

5 Q. And, in fact, you would agree that the event study is the
6 paramount tool for testing market efficiency, right?

7 A. Yes.

8 Q. And you would agree that it is the most important factor,
9 right?

10 A. No.

11 Q. Well, sir, you never put in an expert report, to your
12 recollection, for market efficiency on a security without doing
13 an event study unless there was no data available; correct?

14 A. That's true.

15 Q. And it is a fact that at your deposition you were asked:

16 "Q And wouldn't you agree that the fifth empirical factor is
17 the most important one?"

18 And you testified:

19 "A Generally speaking, yes."

20 Correct?

21 A. Can you read that back, please?

22 Q.

23 "Q And wouldn't you agree that the fifth empirical factor is
24 the most important one?"

25 "A Generally speaking, yes."

H805arc2

Feinstein - cross

1 A. I don't know what went before or after that but as I
2 described, it is a special --

3 THE COURT: Overruled.

4 A. It is a special factor.

5 Q. Let me hand up your deposition, I'm going to give you a
6 binder.

7 May I approach, your Honor?

8 THE COURT: You may.

9 What you are saying in the deposition is of all the
10 factors, that the empirical factor is the most important.

11 A. It certainly, as I understand it, as I have always
12 testified, the factor should be examined holistically and
13 comprehensively.

14 THE COURT: Meaning that you take all of the factors
15 into consideration.

16 THE WITNESS: Right.

17 THE COURT: But of all the factors there, Mr. Edelman
18 is asking you, if you said at your deposition that the
19 empirical factor --

20 MR. EDELMAN: If you look at page 49.

21 THE COURT: -- the empirical factor is the most
22 important. In other words what happened is more important than
23 what should have. What might be expected to happen.

24 BY MR. EDELMAN:

25 Q. Why is it difficult for you to concede that, sir?

H805arc2

Feinstein - cross

1 A. No, I'm going to concede it says: Generally speaking, yes.

2 THE COURT: Generally speaking.

3 Q. And you generally conceded that because you knew that you
4 testified to that effect in multiple other depositions,
5 correct?

6 A. Generally speaking, yes.

7 Q. Because in the next question I ask you:

8 "Q And in fact that's something that you testified to,
9 correct?"

10 And you said:

11 "A Yes."

12 A. No. The question was, and you would agree --

13 THE COURT: Don't take offense to the questions. Do
14 you agree, do you not, that event studies, empirical factors,
15 are more important than indicators?

16 THE WITNESS: But his question was --

17 THE COURT: Look at me, Dr. Feinstein.

18 THE WITNESS: Sure.

19 THE COURT: We agree that what happens in the real
20 world is more important than this kind of a study, than what
21 you think is likely to happen by an indicator.

22 THE WITNESS: Okay.

23 THE COURT: All right. You have it.

24 BY MR. EDELMAN:

25 Q. And that's what you meant when you said "icing on the

H805arc2

Feinstein - cross

1 cake?"

2 THE COURT: Mr. Edelman, we got it. Let's go.

3 Q. Now, you testified that you divided the class period into
4 two parts to study them separately, correct?

5 A. That's right.

6 Q. Did you divide the class period based on when the market
7 capitalization of the securities changed?

8 A. No.

9 Q. Were there dates when the market capitalization of the
10 securities changed?

11 A. Yes.

12 Q. Can we bring up Exhibit 1 to Mr. James' report? We will
13 come back to that.

14 THE COURT: What are you looking for?

15 MR. EDELMAN: I am looking for an exhibit to
16 Mr. James' report. Actually, your Honor, we have a -- I am
17 going to hand up Dr. James' report.18 THE COURT: Do you want him to comment on something
19 that James did?20 MR. EDELMAN: I just want to show him a chart in there
21 that I think we will be talking about.

22 THE COURT: Do you have a copy for me?

23 MR. EDELMAN: I thought I just handed it up.

24 BY MR. EDELMAN:

25 Q. If you could look at Exhibit 1 to that report?

H805arc2

Feinstein - cross

1 A. I see it.

2 Q. So, that's a chart that was contained in Dr. James' report
3 that shows three periods of the class action, correct?

4 A. Yes.

5 Q. And, it notes that you know that there were two significant
6 transactions that dramatically changed the amount of shares
7 outstanding and the float in ARCP shares, correct?

8 A. That's right.

9 Q. And those two changes occurred between February 27th and
10 February 28th where this first dotted line is and, again,
11 between February 6 and February 7th where the second dotted
12 line is, right?

13 THE COURT: Yes.

14 THE WITNESS: Yes.

15 THE COURT: 2013 and 2014, respectively.

16 Q. With that amendment, yes.

17 A. Yes.

18 Q. But the line that you chose to draw, in terms of studying
19 these, was somewhere in the middle of the second period, right?

20 A. That's right.

21 Q. And you chose that line because that was the date that the
22 company announced internalization of its management, correct?

23 A. That's right. The strategy of the company changed and
24 analysts commented that that opened the door for the mega
25 mergers -- the external mega mergers.

H805arc2

Feinstein - cross

1 Q. And that didn't change, on that day, the company's market
2 capitalization, right?

3 A. That's right.

4 Q. It didn't change the characteristics of the market in terms
5 of how many shares were out there, right?

6 A. Correct.

7 Q. And, in fact, that announcement was implemented for some
8 months later, right?

9 A. Right.

10 Q. The internalization that was announced in August, was it?

11 A. Of 2013, yes.

12 Q. It wasn't implemented until when, sir?

13 A. I believe it happened right around the time of the Cole
14 mergers, that's in 2014. No, I'm sorry, it happened around the
15 time of the CapLease merger.

16 Q. But when you were adopting your scientific tests to
17 determine what sub periods to look at, you chose that August
18 2013 date to create two sub periods, right?

19 A. Yes.

20 Q. Now let's turn to your October 29, 2014 allegation-related
21 event study. That's what you call it, right?

22 A. Which page?

23 Q. Do you have something in your report that you refer to as
24 an allegation-related event study, sir?

25 A. Yes.

H805arc2

Feinstein - cross

1 Q. And, you testified that your allegation-related event study
2 was a controlled experiment, right?

3 A. Right.

4 Q. That was your word to describe this study, correct?

5 A. Right, because what it allows a researcher to do is examine
6 the value of the securities in the marketplace when the
7 marketplace did not yet have the October disclosure information
8 and allows you immediately to also seek what is the value of
9 the securities in the marketplace when the marketplace does
10 have that information. So, the only thing that's changing
11 across that break is the market doesn't have the information
12 and the market does have the information, so in a controlled
13 experimental manner you can see the impact of that information.

14 Q. And you conducted an experiment. That's what you said,
15 right?

16 A. I said -- I explained this in the deposition. The market
17 conducted the experiment, I interpreted it.

18 Q. So when you called it a controlled experiment it wasn't a
19 controlled experiment the way economists use the term, it was
20 something that the market did that you are calling an
21 experiment?

22 A. No. It is a controlled experiment in that you can see the
23 value of the securities and you can see how the marketplace
24 behaved, one, without the information; and then two, with the
25 information. So, in that manner, it is an experiment.

H805arc2

Feinstein - cross

1 Q. Let's talk about what you did.

2 Typically in allegation-related event studies one
3 looks at the announcements that are the subject of the
4 allegations of false statements, right?

5 A. I'm not sure what you mean. Do you mean they look at the
6 misrepresentations?

7 Q. Yes. Typically you look at the misrepresentations, right?

8 A. No, that's not true, because in most cases
9 misrepresentations maintain the market's perception that
10 everything is smooth at the company, and so you would not
11 expect misrepresentations and especially omissions when they're
12 made to move the stock price a statistically significant
13 amount. So, you look at the disclosure to see what happened to
14 the security prices when the information finally became
15 available.

16 Q. Well, sir, you testified in response to Ms. Wyman that you
17 have done a lot of these reports in the course of your career,
18 right?

19 A. Yes.

20 Q. And most of them have dealt with market efficiency, right?

21 A. Yes.

22 Q. I think the number was 80, right?

23 A. I haven't counted exactly, but that's a fair estimate.

24 Q. And at your deposition you could not recall a single
25 allegation-related event study where you had used only a single

H805arc2

Feinstein - cross

1 date, correct?

2 A. I can now.

3 Q. At your deposition you couldn't, but you can now.

4 A. That's right.

5 Q. And how many of the 80 were single-event dates?

6 A. I don't know how many the of the 80 but there were three
7 recent cases; Prudential, Freddie Mac, the third one eludes me.

8 THE COURT: I don't think it is going to be important.

9 BY MR. EDELMAN:

10 Q. Now, you did not do an analysis --

11 A. I'm sorry. The BP Alaska.

12 THE COURT: Let it go, please.

13 A. Okay. BP Alaska.

14 Q. You did not do an analysis of earning announcement dates as
15 part of your event study, correct?

16 A. I didn't focus only on the earnings announcement dates,
17 that's right.

18 Q. You never did an analysis?

19 THE COURT: Can I ask, what qualified as an event?

20 MR. EDELMAN: Well, for purposes of the October 29th
21 study first.

22 THE COURT: No. You 45 event days day.

23 MR. EDELMAN: Your Honor, this first test --

24 THE COURT: Counsel, I'm the Judge.

25 MR. EDELMAN: Okay. Answer his questions.

H805arc2

Feinstein - cross

1 THE COURT: You testified there were 45 event days,
2 right?

3 THE WITNESS: Right.

4 THE COURT: How did you fix an event? What made an
5 event?

6 THE WITNESS: So, remember, these events or the
7 collective event study are not dates that one would expect, in
8 an efficient market, would necessarily cause a statistically
9 significant --

10 THE COURT: Answer my question.

11 THE WITNESS: If the company issued an 8-K, so, if the
12 company said this was an event, and then analysts addressed
13 what the company had issued in the 8-K so that analysts also
14 considered it to be important news. So, I looked for -- those
15 are the two screens. It had to be an 8-K --

16 THE COURT: Supposing the 8-K said everything is as
17 good as it was and we consider that life will be as good after
18 as it was before. That should not move the stock, should it?

19 THE WITNESS: That's right; but to be objective I kept
20 it in. If those two objective screens were met it was in 45.

21 THE COURT: So that defines an event.

22 Go ahead, Mr. Edelman. Sorry to interrupt.

23 BY MR. EDELMAN:

24 Q. Wait. You did two studies, the collective event study we
25 are going to get to, and the study I'm asking about now is the

H805arc2

Feinstein - cross

1 allegation-related event study, right?

2 A. Yes.

3 Q. And for that one you chose only one event?

4 A. That's right.

5 Q. And the only event you chose was October 29 when the
6 announcement of all of the problems at ARCP came out, right?

7 A. That's right.

8 Q. And you know that was announced on CNBC, right?

9 A. That's right.

10 Q. It was in the Wall Street Journal that day, right?

11 A. True.

12 Q. That was a Big event with a capital B, right?

13 A. Which is what you are looking -- what a researcher should
14 look for in choosing a market efficiency event study event.

15 THE COURT: What are we trying to bring out,
16 Mr. Edelman?

17 MR. EDELMAN: What's that?

18 THE COURT: What are we trying to bring out?

19 MR. EDELMAN: We are trying to bring out that all this
20 demonstrates is that on one day, where there was a blockbuster
21 announcement, there was a movement in the stock price. And
22 that --

23 THE COURT: Well, he said that for the preferred and
24 the debt he just looked at that one day, but for common he
25 looked at 45 days.

H805arc2

Feinstein - cross

1 MR. EDELMAN: No. For the common he is offering two
2 different experiments which he claims both support his claim of
3 efficiency. With respect to the preferred and the debt, he is
4 only offering this theory which makes no sense.

5 THE COURT: I understand.

6 MR. EDELMAN: And so --

7 THE COURT: I will decide if it makes sense or doesn't
8 make sense, but the common he said there were 45 events.

9 MR. EDELMAN: That's with respect to his collective
10 event study and I am going to get to that.

11 THE COURT: Let's go there right now. I understand
12 your argument. You can't make a rule of one be a basis for a
13 projection for a period of three years.

14 MR. EDELMAN: Before I go to the collective event
15 study can we cover the notes in the preferred and then I will
16 move to the collective event study?

17 THE COURT: He already did, it is one day, October
18 29th.

19 MR. EDELMAN: There is more you should know about the
20 notes in the preferred.

21 BY MR. EDELMAN:

22 Q. First, you would agree that the notes and preferred stock
23 needed to be analyzed for efficiency separately from the common
24 shares, correct?

25 THE COURT: He has already said that.

H805arc2

Feinstein - cross

1 Q. And you made the decision not to perform the collective
2 event study, the 45-day study, on the notes and preferred?

3 THE COURT: He said that because he said he didn't
4 expect anything to happen. Let's -- give me a break. I'm
5 following it. I really am.

6 BY MR. EDELMAN:

7 Q. Sir, you agree that for the preferred shares you believe
8 that none of the 8-Ks issued by ARCP over the entire class
9 period were of sufficient importance that you would have
10 expected a statistically significant price change, correct?

11 THE COURT: For the preferred and the debt. He said
12 it. Can we do on?

13 MR. EDELMAN: Correct?

14 THE COURT: Go to the 45 days, please.

15 BY MR. EDELMAN:

16 Q. Now, the collective event analysis that you did --

17 THE COURT: Collective events means 45 days.

18 BY MR. EDELMAN:

19 Q. 45 days.

20 THE 45-day event analysis that you did, you did the
21 same -- you have done the same analysis in other cases,
22 correct?

23 A. Yes.

24 Q. And in this case, instead of analyzing every 8-K, you
25 placed an additional screen by only including the 8-Ks that

H805arc2

Feinstein - cross

1 were mentioned in an analyst report subsequently, right?

2 A. First of all, I think there is an implication --

3 THE COURT: It is a yes or no answer for this.

4 THE WITNESS: Pardon?

5 THE COURT: A yes or no answer, if possible.

6 THE WITNESS: I'm sorry. Can I hear the question
7 again?

8 THE COURT: Did you filter out the events to include
9 events only that were commented on by analysts?

10 THE WITNESS: That's how I chose the event, yes.

11 BY MR. EDELMAN:

12 Q. And other times when you have done this test you just used
13 all the 8-Ks, correct?

14 A. Not every time, but yes, sometimes I have done that.

15 Q. Like in the *Petrobras* case you used every 6-K --

16 A. That's not accurate.

17 Q. But other times you have used all 6-Ks and you are saying
18 in the *Petrobras* case you applied a filter.

19 A. I did apply a filter in *Petrobras*. I also did a study with
20 all 6Ks. Their press releases were in Portuguese, so, and the
21 analyst reports were in Portuguese. So, I did a 6-K event
22 analysis with screens and also without the screen.

23 Q. But you would agree that in some expert reports you do it
24 will all 8-Ks or all 6-Ks, right?

25 A. I remember in *Petrobras* I did it with screens and also

H805arc2

Feinstein - cross

1 without the screen.

2 Q. Here you didn't do it with all the 8-Ks.

3 A. Right, and there was good reason for that.

4 THE COURT: So, am I to assume from that, that with
5 regard to the ones you didn't do there was no movement? That's
6 what you want me to take from that, right?

7 MR. EDELMAN: No. I want to ask the question -- can I
8 give a piece of context because I don't think -- when you
9 compared --

10 THE COURT: Why don't you do it through your expert.
11 It will come out better and I will understand better.

12 MR. EDELMAN: Okay. Then I get to cross him after
13 that.

14 THE COURT: Maybe.

15 MR. EDELMAN: I need to cross him after that.

16 THE COURT: If the answer is hard enough the answer
17 will be yes, but I don't think I will need it because I think I
18 will understand the issue.

19 Look. I understand. If there wasn't a price movement
20 he wasn't really interested. He was interested in ones that
21 showed price movement and he is arguing -- or Ms. Wyman will
22 argue there were enough days showing price movement to make it
23 statistically significant.

24 MR. EDELMAN: Right, but you know --

25 THE COURT: And you would argue that it is not a valid

H805arc2

Feinstein - cross

1 study unless you do a hundred percent.

2 BY MR. EDELMAN:

3 Q. But you know, Dr. Feinstein, if you had met, if you had
4 used every 8-K it would not have passed this test that you have
5 come up with in your collective event study, right?

6 THE COURT: I don't know what the test is. What is
7 the standard? There is no standard.

8 MR. EDELMAN: It wasn't -- this is why it will come
9 out better after -- if I can explain.

10 THE COURT: There is no standard. There is no
11 standard here.

12 MR. EDELMAN: Your Honor, there is a standard.

13 THE COURT: He said that it was more movement than the
14 average security, right? That's the standard.

15 THE WITNESS: On typical days.

16 THE COURT: It is a relative standard. There is more
17 movement where there was event that sparked some price change
18 than there is with most other companies. How he got that, I
19 don't know, but that's what he is saying.

20 MR. EDELMAN: Your Honor, if I may?

21 BY MR. EDELMAN:

22 Q. Is the essence of this test that you conducted that you
23 compared the likelihood of a move on a news day to the
24 likelihood of a move in the stock price that was statistically
25 significant on a non-news day, and you determined whether there

H805arc2

Feinstein - cross

1 was a statistically significant difference between news day
2 movement and non-news day movement?

3 THE COURT: He didn't do that. That's not it.

4 MR. EDELMAN: Is that what you did, sir?

5 THE COURT: He didn't make a comparison between
6 non-news days and news days. He didn't make a comparison
7 between those news days that resulted in a price change and
8 those that didn't. He said that where there is change in
9 stocks, generally, there was less of a change than there was in
10 the change of news days with ARCP.

11 Look. That is no standard. I know that.

12 BY MR. EDELMAN:

13 Q. Sir, when you did your test you based it on an --

14 THE COURT: Unless there is an objectively standard
15 sampler you can't compare one to the other. I understand that.
16 So, why are we belaboring it?

17 MR. EDELMAN: Let me move on. If I need to, I will
18 cover it later.

19 BY MR. EDELMAN:

20 Q. You based your test on something, a paper by Ferillo and
21 some co-authors, correct?

22 A. Yes.

23 Q. And you have seen that the Ferillo paper refers to
24 measuring the test results using unequal variances, correct?

25 A. I understand that, yes. No. That --

H805arc2

Feinstein - cross

1 Q. And --

2 A. Well, yes.

3 Q. When you conducted your test, did you use unequal
4 variances?

5 A. No. I used the appropriate Z-test statistic.

6 THE COURT: The answer is.

7 THE WITNESS: I used the equal variances.

8 THE COURT: The answer is yes. The variance that you
9 considered equivalent but there is no objective way of
10 measuring this using equal variance, right?

11 THE WITNESS: No, there is.

12 THE COURT: There is. What is the standard way?

13 THE WITNESS: Well, it is a little bit technical here.

14 The construction of the Z-statistic, but the
15 Z-statistic has to be constructed before the experiment is run
16 consistent with the null hypothesis that is being tested. And
17 the question in this experiment is is there more stock movement
18 on news days versus non-news days. So, therefore, the null
19 hypothesis in this test is exactly the opposite: Do news days
20 have equal or less movement than typical non-news days.21 So, the Z-statistic has to be constructed under the
22 assumption of that null hypothesis that the news days have
23 equal or less movement.

24 THE COURT: But you didn't do that here.

25 THE WITNESS: No, I did. I did. Dr. James is arguing

H805arc2

Feinstein - cross

1 that it should have been done a different way. I did exactly
2 that.

3 THE COURT: You testified that you compared it against
4 stocks generally, but you took 45 new days of a much larger
5 sample and said that I guess that -- I don't think you made a
6 comparison between non-news days and news days. If you did,
7 show me the table.

8 THE WITNESS: The table is here.

9 MS. WYMAN: Your Honor, I think you are
10 misunderstanding his test and if you give him an opportunity to
11 show you and explain what he did.

12 THE COURT: Very well. I apologize for being hasty.

13 Continue, Mr. Feinstein.

14 THE WITNESS: My Z-statistic was constructed correctly
15 and I believe Dr. James' Z-statistic was constructed
16 incorrectly, because under the null hypothesis that news days
17 have equal or less movement, the general population variance is
18 going to be greater than the variance from among news days, and
19 therefore the equal variance Z-statistic will be appropriate or
20 even conservative. To use an unequal variance you are using
21 output from the experiment that shows there is greater movement
22 on news days to essentially increase the variance in the
23 Z-statistics which moves the goal post away from, you know,
24 once there is a finding of significance it moves the goal post
25 so that you have the appearance of no significance.

H805arc2

Feinstein - cross

1 BY MR. EDELMAN:

2 Q. I am asking a much simpler question.

3 At your deposition you testified that you based this
4 methodology on the Ferillo paper, correct?

5 A. Yes.

6 Q. And the Ferillo paper talks about unequal variances, right?

7 A. It mentions it, but --

8 Q. And you, instead of using a test using unequal variances,
9 you used a test using equal variances, correct?

10 A. And I have reasons for doing that.

11 MR. EDELMAN: Your Honor, I have some other
12 examination that relates to the manner in which the 8-K
13 selection screen was used which I think will make more sense
14 after our expert has testified so I propose I sit down.

15 THE COURT: Okay.

16 MR. EDELMAN: Okay.

17 THE COURT: All right. I set out time slots that
18 apparently do not make too much sense and as you have noted,
19 except for a little bit of impatience during examination and
20 cross-examination, I have let you go on to whatever extent is
21 significant and meaningful to you and we will continue that
22 way.

23 Yes, Ms. Wyman?

24 MS. WYMAN: Your Honor, I think if you allow me to do
25 some redirect examination on Dr. Feinstein now --

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Feinstein - redirect

1 THE COURT: Would you like to do redirect?

2 MS. WYMAN: Yes; it will clear up your confusion about
3 his collective event study.

4 THE COURT: Go ahead.

5 REDIRECT EXAMINATION

6 BY MS. WYMAN:

7 Q. Dr. Feinstein, you recall Mr. Edelman asking you questions
8 about your collective event study, correct?

9 A. Yes.

10 Q. And in constructing your collective event study, did you
11 just make up the methodology?

12 A. No.

13 Q. What was it based on?

14 A. It was based on an article, and it is based on how the test
15 has been applied in other cases by their expert.

16 Q. And is this a methodology that's been used and generally
17 accepted in your field?

18 A. Yes.

19 Q. Okay. Now, when you selected the 8-K days you mentioned
20 that you applied a screen?

21 A. Right.

22 Q. Can you describe to me specifically what kind of screen you
23 applied?

24 A. So, in order to identify if the day had higher than typical
25 news flow, the first screen was was there a company 8-K about

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Feinstein - redirect

1 it. But, most company 8-Ks were about immaterial things that
2 would not -- it might be important for investors in general but
3 immaterial for the valuation of the stock -- changing board
4 seats, the completion of a previously announced building
5 purchase. And, in fact, in this case earnings announcements
6 constituted a large amount of those and the allegation in this
7 case is the company manipulated earnings announcements so that
8 they would be uneventful.

9 So, I knew that the test, as it is generally applied,
10 would already be weak because there were so many of these 8-Ks
11 that were not valuation relevant. So, I could have gone
12 through the 8-Ks myself and subjectively picked out which ones
13 are valuation-relevant and which ones are not but I know that
14 would have been subject to criticism, so I deferred to the
15 analysts. If the analysts commented on the 8-K and said we are
16 going to consider this in how we evaluate this company, that's
17 the second screen. So, the screen was two-fold: An 8-K from
18 the company saying it is a material event, and then an analyst
19 commenting and addressing it indicating that it is meaningful
20 to analysts.

21 Q. And what was the purpose of running this test? What were
22 you trying to understand?

23 A. Because there were so few or just one ideal, single event
24 study candidates for this company because of the nature of the
25 company and because of the nature of the allegations, I was

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Feinstein - redirect

1 looking to do another test that could demonstrate whether or
2 not the stock and the other securities -- or the stock was
3 moving efficiently. So, with the way the test works is it
4 looks for days on which there is a higher than typical news
5 flow, that's what we are after. The collection event is not
6 based on whether I think it is going to cause a statistically
7 significant movement or not, just as it passes a screen that it
8 indicates that there is a higher than typical news flow that
9 day. Then, it compares the price dynamics on news days to the
10 price dynamics on non-news days and if there is evidence that
11 the news generally impacts the stock price it is indicated by
12 the test.

13 And that's a demonstration that the security reacts to
14 news.

15 Q. And you mentioned before that the question you were trying
16 to answer was is there a greater frequency of statistically
17 significant price changes on news days versus non-news days.
18 That was a question you are asking yourself, right?

19 A. Right.

20 Q. And then to construct your experiment you mentioned that
21 you had to test the opposite. Why is that?

22 A. Well, the way classical hypothesis testing works is you
23 pose a question, you construct a test using the opposite of
24 that preposition and see whether the data allows you to reject
25 the opposite. If the data allows you to reject the opposite

H805arc2

Feinstein - redirect

1 then you reject the opposite in favor of the original
2 proposition.

3 So, in this case the proposition is that there is more
4 stock movement on news days. The opposite is that there is
5 equal or less stock movement on news days. So, the test is
6 constructed under the hypothesis that there is equal or less
7 stock movement on news days. The data then show that that's
8 not the case.

9 Q. And is because the hypothesis that you are testing is that
10 there are equal or less likely to be events on news days versus
11 non-news days that you had to use the equal variances that
12 Mr. Edelman was asking you about?

13 THE COURT: I don't understand the question.

14 MS. WYMAN: Let me rephrase it because it really
15 wasn't a very good question. I will just do it more directly.

16 Q. Why is it that you used equal variances versus unequal
17 variances in the test that you ran?

18 A. Because it's -- two reasons.

19 Under the null hypothesis that news days have the same
20 or less movement, using the general population variance it is
21 going to be higher and therefore a more conservative
22 Z-statistic for evaluating the results. If you would -- the
23 other way that Dr. James proposed is incorrect, it eviscerates
24 the power of the test, it biases the test in a manner so that
25 you are not likely to find a significant result, you are not

H805arc2

Feinstein - redirect

1 likely to see the significant effect of information on prices
2 even when there is a significant effect of information on
3 prices.

4 Q. You keep talking about a Z-statistic. What is that?

5 A. A Z-statistic is a mathematical formula that the output
6 from the test allows you to evaluate which then could be
7 compared to standard tables to see whether the data are
8 consistent or inconsistent with the proposition being tested.

9 Q. And how do you know whether or not the Z-statistic that
10 your test generates indicates efficiency or not?

11 A. Well, under the null hypothesis there is a range of
12 reasonable Z values.

13 Remember, the null hypothesis here is that information
14 is not affecting the stock price and under that hypothesis
15 there is a certain reasonably expected range of Z-scores. If
16 the data and test produce a Z-score that is way outside that
17 range of reasonableness you should, you are compelled to reject
18 that null hypothesis in favor of the alternative which is that
19 information does affect the security price.

20 Q. And why is it that you couldn't do this collective event
21 study using each of the 8-Ks that ARCP issued?

22 A. You could, but it just wouldn't be informative.

23 Given what we know about this company, that it is a
24 REIT, given that it is designed to be stable, given what we
25 know about the earnings announcements or at least what is

H805arc2

Feinstein - redirect

1 alleged about the earnings announcements, that it is alleged
2 that they were manipulated to be unsurprising and uneventful,
3 and given that we know that from reading the news that most of
4 the 8-Ks were about mundane, routine things that happened in
5 the regular course of business, you would be contaminating the
6 new sample with so many observations that were not really news
7 that the test itself would be weak. You wouldn't really be
8 comparing news days to non-news days, you would be comparing a
9 contaminated sample of news days with a lot of non-news thrown
10 in with non-news days.

11 THE COURT: I think have you done it.

12 MS. WYMAN: Do you understand?

13 THE COURT: Yes.

14 MS. WYMAN: Okay. Thank you.

15 THE COURT: You can step down, Dr. Feinstein. Thank
16 you very much.

17 Take a five-minute break.

18 (Recess)

19 THE COURT: Yes, Ms. Wyman?

20 MS. WYMAN: If you will indulge me, your Honor, before
21 we get started, I wanted to be sure that all of your confusion
22 was cleared up.

23 You had mentioned during Mr. Edelman's --

24 THE COURT: Why don't we say there is more than just
25 confusion. There is controversy. That's part of it.

H805arc2

Feinstein - redirect

1 MS. WYMAN: I want to make sure you understand that
2 the collective event study is tethered to a standard and you
3 had mentioned.

4 THE COURT: I understand that and I think I was in
5 error in that comment. There is controversy about the efficacy
6 of the standard but I understand.

7 MS. WYMAN: Thank you.

8 THE COURT: Okay, Mr. Edelman.

9 MR. EDELMAN: Dr. James, would you take the witness
10 stand?

11 Your Honor, we have a PowerPoint presentation that I
12 am going to use with Dr. James to walk him through his
13 examination. We provided it to counsel yesterday evening.

14 THE COURT: Okay.

15 CHRISTOPHER MARTIN JAMES,

16 called as a witness by the Defendant,
17 having been duly sworn, testified as follows:

18 THE WITNESS: Can I clean up here a little bit?

19 THE COURT: Would you please, Ms. Wyman?

20 MS. WYMAN: Yes.

21 MR. EDELMAN: Some of those were mine.

22 THE WITNESS: I have yours.

23 THE DEPUTY CLERK: Please state your full name and
24 spell your last name, slowly, for the record.

25 THE WITNESS: Christopher Martin James. J-A-M-E-S.

H805arc2

James - direct

1 DIRECT EXAMINATION

2 BY MR. EDELMAN:

3 Q. Dr. James, how are you employed?

4 A. I am with the William H. Dial Eminent Scholar in Finance at
5 the University of Florida.

6 Q. Where did you get your Ph.D?

7 A. I got my Ph.D at the University of Michigan.

8 Q. Can you just sketch, really quickly, your professional
9 career since University of Florida?

10 A. Sure.

11 I have taught at a number of universities including
12 Cambridge University in the UK, University of Michigan. I have
13 got an academic career that spans now almost 40 years. I have
14 been an editor or associate editor of all the major journals in
15 finance and I have served as an expert witness in a number of
16 cases including a number of securities cases.

17 Q. And you have been an expert in many, many cases, correct?

18 A. Over the span of my career; that is correct.

19 Q. Can you give the Court an overview of what your testimony
20 will be this morning?

21 A. Sure, and we prepared, I think, a PowerPoint --

22 Q. Yes.

23 A. -- that addresses that.

24 I think in my experience in securities cases, this one
25 is unusual and it is unusual for a couple of reasons. The

H805arc2

James - direct

1 first is this is a company that dramatically changes over the
2 class period.

3 THE COURT: I think you would be more comfortable
4 facing --

5 THE WITNESS: Him?

6 THE COURT: Yes, because I'm a short guy and there is
7 a big barrier between us and you have to strain your neck.

8 THE WITNESS: Okay.

9 So, this is unusual in part because this is a company
10 that undergoes, really, transformative events during the class
11 period starting out as a microcap stock and ending up with, you
12 know, \$20 billion in assets and \$10 billion in market caps. So
13 big changes during the class period.

14 THE COURT: What was the first one? Micro?

15 THE WITNESS: Microcap stock, so its public float was
16 under \$100 million. And that's important when thinking about
17 issues regarding market efficiency and damage methodologies in
18 a securities case.

19 The second thing I'm going to point out is the tests,
20 the direct tests that Dr. Feinstein proposes are relatively
21 easy tests to pass and when properly conducted, they don't pass
22 for most of the class period for the common stock at issue
23 here.

24 The only empirical test that you construct for
25 purposes of the preferred and the bonds are a test that looks

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James - direct

1 at one day, the last day in the class period. He hasn't
2 provided any evidence that the securities were efficient during
3 the proposed class period. In fact, he can't construct the
4 collective event test for the bonds and notes, in part, because
5 as he concedes, there aren't events that are likely to be
6 moving those, the prices of those securities.

7 And then the final point I want to make is that here
8 we have, at the end of a class period, a corrective disclosure,
9 an alleged corrective disclosure, which pertains to the first
10 two quarters of 2014 which means that any sort of price
11 reaction you are observing at the end of the class period isn't
12 a price reaction that you can use to compute damages or
13 inflation earlier in the class period than May 8th, 2014.

14 THE COURT: There are at least two arguments for
15 projecting backwards. One is statements made in that very 8-K
16 about the unreliability or the probable unreliability of
17 earlier statements; and the second is the common sense notion
18 that fraud that begins at one point in time is likely to have
19 begun earlier.

20 THE WITNESS: Well, I think there is two responses.
21 First, the company is making a statement regarding AFFO that is
22 mistaken. It is not saying and it is not revealing any
23 mistakes on earlier financials.

24 THE COURT: True. True.

25 THE WITNESS: And second, the nature of AFFO itself

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James - direct

1 when are you thinking about a company that has \$20 billion in
2 assets and is announcing a mistake in calculation of AFFO, when
3 it has 3,700 properties versus is that going to be informative
4 of any inflation at an earlier point in time when the company
5 has 90 properties and seven tenants. Just economically it is
6 not something that is a useful methodology to employ in a
7 company that is changing so dramatically, putting aside the
8 fact of the disclosure being only with respect to the first two
9 quarters in 2014.

10 BY MR. EDELMAN:

11 Q. We are going to skip over the slide that defines market
12 efficiency --

13 A. Thank you.

14 Q. -- and we are going to move to the Cammer and Krogman
15 factors.

16 What I would like you to comment on is not as a lawyer
17 or judge but as an economist. How do economists relatively
18 weigh the various Cammer and Krogman factors?

19 A. Well, if we put aside the direct test of what we call
20 market efficiency, a cause and effect relationship between new
21 publicly available information in the share price, the other --
22 Cammer factors -- are really indirect measures. They're things
23 we look at to say is the market conducive to market efficiency
24 but they're not demonstrations of market efficiency. And there
25 is no bright lines in those measures from a financial economics

H805arc2

James - direct

1 point of view. So, when you are asking the question what about
2 analyst coverage, is one or two enough? What about trading
3 volume? One of the things that economists do look at is are
4 market participants discussing and raising concerns about
5 impediments to information getting embedded into securities
6 prices. And you see that here.

7 THE COURT: Impediments to information become embedded
8 prices?

9 THE WITNESS: Yes.

10 THE COURT: Is that right?

11 THE WITNESS: So, if you have for example, as you do
12 in this case during the class period, during most of the class
13 period there was only two analysts covering the stock and both
14 analysts are saying a bar to institutional ownership of the
15 stock is its illiquidity. They are saying that with some of
16 these transformative mergers, the investor base of ARCP may
17 change such that you are going to get more institutional
18 involvement in the marketplace and that's what you see, that
19 you see very little institutional involvement in this stock
20 early on in the class period and it changes dramatically as
21 these transformative events occur.

22 BY MR. EDELMAN:

23 Q. Let's turn to the chart on page 8 of the PowerPoint.

24 THE COURT: Are you -- has this been submitted in
25 advance?

H805arc2

James - direct

1 MR. EDELMAN: Yes.

2 THE COURT: You did last night.

3 MR. EDELMAN: I provided it to counsel last night.

4 THE COURT: You need to mark it for the record.

5 MR. EDELMAN: Yes. I would ask that we --

6 THE COURT: Exhibit A?

7 MR. EDELMAN: We will call it Exhibit A.

8 THE COURT: Give Ms. Jones a copy to mark.

9 MR. EDELMAN: It will actually be Exhibit B because I
10 think the expert report is Defendant's Exhibit A.11 THE COURT: Dr. James' report will be Exhibit A
12 received in evidence, and Exhibit B will be the PowerPoint.

13 In evidence or illustrative? Put it in evidence.

14 Are you say are okay with that, Ms. Wyman, in
15 evidence?16 MR. DROSMAN: Your Honor, this is Dan Drosman. I
17 think it is demonstrative so I don't think it should be in
18 evidence.19 THE COURT: Well, so is the report. I don't usually
20 take a report as an exhibit either but in this kind of
21 proceeding I think it is what the expert is relying on. So, we
22 will mark both and receive both in evidence.

23 (Defendant's Exhibits A and B received in evidence)

24 BY MR. EDELMAN:

25 Q. So, taking a look at that chart, can you describe what that

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James - direct

1 chart illustrates to you as relevant to this case?

2 A. Sure. So, I have graphed two things. On the left --

3 Q. Can you pull the microphone closer?

4 THE COURT: Speak louder. It is even better.

5 A. All right, I will speak louder.

6 So, market capitalization is on the left legend and
7 the assets of the company are on the right legend. And what
8 you can see here is that the company undergoes what I think are
9 two transformative events. An analyst, by the way, discussed
10 these as transformative events. The first is the ARC III
11 merger in which the company's assets increase by over 700
12 percent and the company really goes from a microcap stock to
13 having a market capitalization of about \$1.8 billion.

14 The second transformative events is the Cole merger
15 which occurs in February of 2014, and there again you see a
16 increase in the company's market cap as well as an increase,
17 substantial increase in the assets that the company has. And
18 this is indicative of a company changing fairly dramatically
19 during the period that's covered by the class here.

20 Q. Now, you heard Dr. Feinstein testify about the average
21 market capitalization over the whole period, correct?

22 A. Right.

23 Q. But if you look at just the first period, the pre-ARC III
24 period, how is the market capitalization for that period
25 compared with market capitalization of, let's say, the post

H805arc2

James - direct

1 Cole period?

2 A. There is really no comparison in the sense that they're not
3 comparable in the sense that the market capitalization in the
4 pre-ARC period, it is a microcap stock. In the post-Cole
5 period it is one of the larger market cap stocks in the
6 marketplace. Now, if you average the two you are going to say
7 it is on average a large cap stock. But, during the early part
8 of the class period it is clearly a very small company with a
9 small asset base.

10 Q. Now, Dr. Feinstein testified that he divided this larger
11 period into two parts dividing it sometime in August based upon
12 an announcement of internalization. As an economist, is that a
13 methodology that makes sense to you?

14 A. It doesn't make sense to me. It's not associated with any
15 change in the structure of the market for this company, it is
16 not associated with a change in its asset base. It is not
17 associated with any sort of capital structure change that the
18 company is undergoing. I think that -- I think, more
19 appropriately, let's look at when the company changes and to
20 take a look at within the class period when the company is a
21 microcap stock, between the ARC III merger and the Cole
22 acquisition and then after the Cole acquisition in which the
23 company grows substantially and rises to a company with a \$10
24 billion market cap.

25 Q. Now, you mentioned earlier that there were two analysts

H805arc2

James - direct

1 that were covering the company and that they, at points, made
2 statements about the liquidity or illiquidity of the market. If
3 you could turn to the next slide there is a slide about JMP
4 securities on March 1, 2013. Why did you want to highlight
5 that to the Court?

6 A. This is one example of -- so, there are two analysts during
7 the beginning part of the class period that are covering the
8 stock; JMP is one and Ladenburg is the other and both are
9 saying -- in this case I pulled out from JMP a statement
10 concerning investment risks and what they're saying is: Trade
11 illiquidity. Just 11,000 shares trade daily, on average,
12 representing about 120 K of market value. We believe the
13 limited share volumes will preclude institutional investors
14 that seek active trading level from making meaningful
15 investments in the company.

16 Q. That statement was made on March 1, 2013 at the beginning
17 of your second sub period?

18 A. That's correct.

19 Q. So it was made at the conclusion of the entirety of the
20 first sub period that you described as being under
21 \$100 million?

22 MR. DROSMAN: Objection, your Honor. Leading. He has
23 been leading the entire time.

24 THE COURT: Overruled.

25 Q. Can you turn to the next slide? Why did you want to

H805arc2

James - direct

1 highlight that for the Court?

2 A. Again, it is around the same period of time and it is
3 actually connected to an event in which market participants are
4 concerned about information not getting embedded into the share
5 prices. And here an analyst is saying that ARCP should receive
6 plenty of support from large institutions that were unable or
7 unwilling to own ARCP because of its microcap size and thin
8 liquidity. And that was made by the other analyst following
9 the stock during this period of time on March 4th, 2013.

10 Q. Take a look at slide no. 11. How, aside from the market
11 cap, how did the company change over the course of a class
12 period?

13 A. Well, it's transformation is fundamental. If you start the
14 class period you have got seven tenants and 90 properties and
15 less than \$100 million in assets. The company grows, and grows
16 dramatically. Post-Cole merger you have 3,710 properties, \$20
17 billion in assets, and over 1,100 tenants. So, it is a
18 fundamentally different company in terms of the assets that are
19 generating its earnings than it was at the beginning of the
20 class period when it had 90 properties and seven tenants.

21 THE COURT: May I have a copy of what you are working
22 with?

23 MR. EDELMAN: Sure. I thought we had handed one up.

24 Q. We are going to move to page 14, your Honor.

25 Now, I would like to direct your attention to the

H805arc2

James - direct

1 first of the two tests that Dr. Feinstein testified about, the
2 October 29, 2014 test and I would ask you, do you believe that
3 that is a scientifically reliable test that economists like you
4 and Dr. Feinstein would rely upon in your work?

5 A. No.

6 Q. Can you explain why not?

7 A. For several fundamental reasons.

8 Q. Keep your voice up for me.

9 A. Okay.

10 First, a price reaction on October the 29th, 2014
11 can't demonstrate market efficiency throughout the class
12 period. When you think about what market efficiency is, a
13 market is in which available information is rapidly
14 incorporated into the price of the security such that trading
15 prices reflect all available information. That's a quote from
16 Dr. Feinstein's report. Okay? So, one day in the class period
17 doesn't tell you anything about all the other days in the class
18 period in terms of whether the market is rapidly incorporating
19 value-relevant information into the price of the security.

20 We are hesitant, as scientists, to extrapolate from a
21 sample of one, to a population in the common stock of over 600
22 days. The second problem --

23 Q. Is hesitant an understatement when you say you are
24 hesitant?

25 A. I don't think it is the stuff of good science.

H805arc2

James - direct

1 Q. Another understatement. Go on.

2 A. A properly conducted study of market efficiency should show
3 a consistent relationship between new material information and
4 the price reactions, and the problem with focusing on one day
5 is you are not showing a consistent relationship, you are
6 focusing on one day and it is a day that if you, in reading the
7 complaint, you would know there was a significant price
8 reaction. So, it's confirming something that's in the
9 complaint, it is not an independent experiment of new
10 information coming into the marketplace.

11 Q. In your experience, is it common in analyses of market
12 efficiency for experts to look at earnings announcements or
13 earnings-like announcements like AFFO?

14 A. Yes.

15 So, the academic studies, you know, I have reviewed
16 and am familiar with, of market efficiency, look at events such
17 as earnings announcements and say are earnings surprises
18 associated with significant price movements. In securities
19 cases that I have been involved in, that is also a frequently
20 employed technique.

21 So, what you do is you say let's look at what analysts
22 think the company's earnings are going to be and there is a
23 consensus which represents the median of analyst forecasts and
24 ask, well, when the company announces its results, if they're
25 substantially above what analysts' consensus estimate is,

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James - direct

1 that's referred to as a positive earning surprise. And that
2 should be associated, typically, with a positive stock price
3 reaction. Similarly, if the earnings come in below the analyst
4 forecast, then that would be considered a negative earning
5 surprise.

6 Q. Now, did you do any analysis of the market reaction to AFFO
7 announcements in this case?

8 A. I did. During the class period --

9 Q. Is that reflected at page 16?

10 A. Yes.

11 Q. And that's a copy of information that's an exhibit to your
12 report, correct?

13 A. That's correct.

14 Q. And can you explain what that shows?

15 A. Sure.

16 So, there were 10 earnings announcements during the
17 class period beginning with the first quarter 2012 and ending
18 with the first quarter of 2014. And what I have done is gotten
19 from a source called S & P Capital IQ, what the consensus
20 estimate from analysts was and compared it to the actual
21 results as reported by Capital IQ. And I note when there is an
22 earnings surprise that is positive -- so for the first quarter
23 of 2012 you see one and a half cents -- it is in black, that's
24 a positive surprise of one and a half cents which is 7 percent
25 above the consensus estimate.

H805arc2

James - direct

1 Similarly, there were other events during this event
2 in which there were negative surprises. So, for example, on,
3 for the third quarter of 2012 on 10/31/2012 there was a miss by
4 3.2 cents which was a miss of 12 percent relative to analyst
5 consensus forecasts. So then what I did --

6 THE COURT: What does abnormal mean, the abnormal
7 return column?

8 THE WITNESS: So, that means what is the return of the
9 common stock of ARCP controlling for market and industry
10 factors. So, what is the unusual movement in the common stock.
11 So, it is just taking the common stock return and correcting
12 for market and industry movements to see what is
13 company-specific stock return. And then I test whether it is
14 statistically significant, substantially different from the
15 normal variability that you observe in the stock, and then the
16 last column says whether it is statistically significant or
17 not. And as you can see, there is two earnings announcements
18 that are associated with a statistically significant stock
19 price movement. The first is on February 28, 2013; and the
20 second, and they're highlighted in yellow, is the earnings
21 announcement on February 27, 2014. And you can see that on
22 February 28, 2013 there was a positive earning surprise, in
23 other words the company delivered earnings that were above what
24 analysts had expected but the stock price is down, it is down
25 almost 5 percent and is statistically significant.

H805arc2

James - direct

1 THE COURT: Which period is this?

2 THE WITNESS: So it is the highlighted in yellow, the
3 first one.

4 THE COURT: 2012, fourth quarter?

5 THE WITNESS: Yes. See the 3 cent difference?

6 THE COURT: Yes.

7 THE WITNESS: 13 percent earnings surprise positive;
8 negative stock return around 5 percent -- 4.87. The T
9 statistic is minus 4.05 which means that it is statistically
10 significant and different from zero and it is in the wrong
11 direction of the earnings surprise for reasons that I will
12 explain in just a minute.

13 The other place where I found the significant price
14 reaction -- so, I only found two out of 10 in which there are
15 earnings surprises. The other is on February 27th, 2014 where
16 the company misses analyst expectations by 4 percent and the
17 company stock price is up 2.73 percent which is statistically
18 significant.

19 So, you have, for most of the earnings surprises, not
20 a statistically significant price movement, and where you do
21 see a statistically significant price movement it is in the
22 opposite direction.

23 BY MR. EDELMAN:

24 Q. Let's take a look --

25 THE COURT: Do you need to know what other stocks in

H805arc2

James - direct

1 the same category are doing in order to complete this analysis?

2 THE WITNESS: And that's what I have controlled for.

3 So, this abnormal return is controlling for -- it is
4 using the same regression model that Dr. Feinstein proposes
5 which controls for the industry which is other REITs, and it
6 controls for other market-wide factors as well. So, it is
7 saying here is company-specific information that is coming to
8 the market and what's unusual about the company stock price
9 controlling for industry and market factors.

10 THE COURT: Just so I understand this, looking at 2013
11 fourth quarter, there was a disappointing earnings earning of a
12 dollar or a penny?

13 THE WITNESS: A penny.

14 THE COURT: A penny.

15 THE WITNESS: Per share.

16 THE COURT: Per share; 4 percent lower than
17 expectations?

18 THE WITNESS: Correct.

19 THE COURT: However the stock price is increased by
20 2.73 percent against an expectation that it should increase
21 because of other REITs 2.27 percent.

22 THE WITNESS: What it is saying --

23 THE COURT: Is that how to read that?

24 THE WITNESS: What it is saying is controlling what
25 other REITs are doing, this company is up in a statistically

H805arc2

James - direct

1 significant way, by 2.73 percent controlling for what other
2 REITs are doing.

3 THE COURT: What does 2.27 mean?

4 THE WITNESS: 2.27 is a T statistic, and the threshold
5 for statistical significance is roughly 1.95. So, it is
6 statistically significant at the 5 percent level which is the
7 standard that is used in my profession to evaluate whether
8 something is unusual in a statistical sense.

9 The other one is the February 28, 2013 where you see
10 an earnings surprise of 13 percent and the abnormal return,
11 meaning controlling for industry and market factors, this
12 company's stock price was down minus 4.87 percent with a
13 T-statistic of over 4 which means it is highly unlikely that
14 it's due to chance and would be viewed by the profession, the
15 standards of my profession as being statistically significant
16 and an indication of a unusual movement in the stock price.

17 THE COURT: And from unusual movements you would infer
18 market inefficiency?

19 THE WITNESS: Not necessarily.

20 What you would infer is market inefficiency is if you
21 observe what is positive information -- an earnings surprise --
22 associated with a negative price reaction, and you look out and
23 see what market participants are saying about what's moving the
24 stock price. Why isn't positive information getting embedded
25 into the stock price? And what analysts say, for example, on

H805arc2

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1 February 28, 2013 is there is an impediment to getting
2 market -- this positive information into the marketplace. It
3 is the thinness in which the company's stock is trading. There
4 is converting shares that are impacting the order flow of the
5 company on this day so there is not enough activity by
6 arbitragers, by professional hedge funds and the like to smooth
7 out what would be positive information. It is not getting
8 embedded into the price.

9 BY MR. EDELMAN:

10 Q. You just made reference to what analysts are saying. You
11 are referring to the February 28th, 2013 announcement and that
12 was a reference to the analyst commentary on March 1st, 2013
13 and March 4, 2013 that we just reviewed earlier?

14 A. Yes.

15 THE COURT: Even though the company was getting, was
16 earning 3 cents a share, 13 percent better than expectations,
17 the stock price was dropping almost 5 percent?

18 THE WITNESS: Yes.

19 THE COURT: And you are saying that is because there
20 is the impediment of thinness in the market?

21 THE WITNESS: Yes. Analyst reports during the period
22 of time, some of which we just looked at are saying, look, it
23 indicates a lack of liquidity in the marketplace, the thinness
24 in the marketplace that they believe that sales of newly issued
25 shares that had already been announced are having a depressing

H805arc2

James - direct

1 effect on the company stock.

2 THE COURT: But in the fourth quarter of 2013 when the
3 company's capitalization was much more substantial, you have a
4 disappointment of 4 percent in earnings --

5 THE WITNESS: Yes.

6 THE COURT: -- you had a price increase of 2.75
7 percent. Why should that be if the market then is much more
8 efficient?

9 THE WITNESS: I think that that's, again, evidence of
10 what I will refer to as anomalous in the sense it is not what
11 you would expect in an efficient market.

12 BY MR. EDELMAN:

13 Q. Just to clarify, Dr. James, with respect to February 27,
14 2014, you are not saying that there wasn't other unrelated
15 information that might have had an increase on -- might have
16 caused an increase on the stock that day, correct?

17 A. I looked. I didn't see any confounding information.

18 I think the important thing, the take away from this
19 is Dr. Feinstein didn't do an earnings announcement analysis as
20 he has done in other cases and the take away from this earnings
21 analysis is the stock isn't moving in a manner consistent with
22 the earnings surprises that you are observing. Okay?

23 THE COURT: Why don't we take a break for lunch.

24 MR. EDELMAN: Sure.

25 THE COURT: Come back afterwards.

H805arc2

James - direct

1 Off the record.

2 (Discussion off record)

3 THE COURT: So let's get back at 2:15, approximately.

4 (Continued on next page)

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James - direct

1 A F T E R N O O N S E S S I O N

2 2:25 p.m.

3 CHRISTOPHER JAMES, Resumed.

4 THE COURT: Dr. James, you remain under oath.

5 Mr. Edelman, please continue your direct examination.

6 DIRECT EXAMINATION (Cont'd)

7 BY MR. EDELMAN:

8 Q. Dr. James, I would like to turn your attention to the
9 collective event, the 45-day event study.

10 A. OK.

11 Q. Did you identify any flaws -- well, before I get to that,
12 are you familiar with the article on which that study was
13 based?

14 A. I am.

15 Q. What is that article?

16 A. It's an article by Ferrillo, et al., which appeared, I
17 think, in the *St. John's Law Review*. It's an article that
18 Dr. Feinstein cites to in support of his use of comparing
19 through a collective-event study news and non-news based.20 Q. In reviewing the 45-day event study, did you identify any
21 aspects of that analysis that you believed were flawed?22 A. I did. I identified what I think are two key flaws. There
23 are other flaws, but I think the two flaws that are most
24 problematic is that he conducts a comparison using an
25 inappropriate test. The article that he cites to compares

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James - direct

1 price movements on news and non-news days. And when comparing
2 the frequency of significant price movements on the news days
3 versus the non-news days, they assume correctly an unequal
4 variance, meaning that the variance in the news days and the
5 non-news days is different. And that's what a statistics text
6 would tell you to do if you're conducting what's called a
7 one-tailed test.

8 THE COURT: A what test?

9 THE WITNESS: A one-tailed test. So you're saying,
10 are there more significant price actions on news days compared
11 to the null, which is, as Dr. Feinstein said, no difference or
12 fewer. OK. And that difference, meaning that one-tailed test,
13 calls for the appropriate test statistic to be an unequal
14 variance.

15 THE COURT: Who was the fellow that he relied on?

16 THE WITNESS: It's Ferrillo, Tabak, and I forgot the
17 last guy's name.

18 THE COURT: Do they have any reputation?

19 THE WITNESS: They do. And I've spoken to Dr. Tabak
20 concerning this, and he confirmed with me that, in a one-tailed
21 test it's appropriate to --

22 THE COURT: Well, I don't need that. That would be
23 hearsay. But they have a reputation as economists?

24 THE WITNESS: Yes.

25 BY MR. EDELMAN:

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James - direct

1 Q. So let's direct your attention to slide 20.

2 THE COURT: Before we leave that, an unequal variance
3 means what?

4 THE WITNESS: So when you're comparing essentially the
5 average of two samples, OK, so you have a sample of news days
6 and a sample of non-news days, do you assume that within those
7 samples the variability is the same or is it different, in
8 terms of the underlying variability of the data? The data
9 indicate that the variability is different. And the way the
10 hypothesis is structured, being a one-tailed test, your prior
11 would be that they're different, which is why the Tabak et al.
12 article uses a test that accounts for the differences in
13 variance.

14 THE COURT: When you say "unequal variance," you mean
15 the variation in price movement on non-news days is used as
16 comparison to the variation in price movement on news days. Is
17 that what you mean?

18 THE WITNESS: It's basically the variation between
19 when you have significant news days and nonsignificant news
20 days relative to the variation in significant non-news days
21 versus insignificant non-news days.

22 THE COURT: So you would expect that a news day would
23 produce a greater variation in price than a non-news day.

24 THE WITNESS: The variation within the news day sample
25 is different than the variations in the non-news day sample.

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James - direct

1 THE COURT: And what does that indicate?

2 THE WITNESS: It indicates that the appropriate test
3 to compare the difference in the proportion of the days that
4 are significant between the two samples should employ an
5 unequal variance.

6 THE COURT: You would expect, if there were any
7 stimulus that would provoke a response, that the responses
8 might vary according to the intensity of the stimulus.

9 THE WITNESS: So --

10 THE COURT: You would expect that the variation in
11 price movement in news days would exceed the variation in
12 prices on non-news days.

13 THE WITNESS: Well, what we're really asking is where
14 the -- so we're not looking at the magnitude of the statistical
15 significance. We're just counting the number of days that are
16 statistically significant in the news sample and in the
17 non-news sample. And it's the variation within that count
18 which is what is being incorporated into the test stat
19 statistic?

20 THE COURT: Variation in what? Price movement?

21 THE WITNESS: No, the variation is 1 if it's a
22 significant price reaction and 0 if it's not. And the
23 proportion is basically -- so, for example, if you turn to the
24 next slide, if you would, 22, slide 22.

25 So if you look at this, take the pre-ARCT period,

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James - direct

1 post-ARCT period, and post-Cole period. Notice that the
2 proportion of significant news days in the pre-ARCT period is
3 16 percent. In the post-ARCT period it's 16 percent.

4 THE COURT: Where are these percentages?

5 THE WITNESS: So if you go down, it's the fourth line.
6 You see where it says "news days"?

7 THE COURT: It says 20 percent and 32 percent -- oh, I
8 see. 16.67 percent.

9 THE WITNESS: What that's saying is, he's identified a
10 set of news days where there's analyst commentary, where he
11 expects there to be price movement. In 16 percent of time you
12 see it in the pre-period, 50 percent in the post-Cole period,
13 so there's an increase during the Cole period. What we're
14 really asking in the question is, is that 16.67 meaningfully
15 different from the proportion of significant news days in the
16 non-news day sample, which is 4.52. And the Z-score tells you,
17 because it's below 1.67, that it's not statistically
18 significant. So we don't have a scientific basis for
19 concluding that the frequency of significant price movements on
20 news days is any different than non-news days.

21 THE COURT: Just so I understand this, on news days,
22 16 percent of the time there's a significant price movement.

23 THE WITNESS: Right.

24 THE COURT: On non-news days, 4 1/2 percent of the
25 time there's a significant price movement.

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James - direct

1 THE WITNESS: Right.

2 THE COURT: Why should that -- that seems to be
3 normal.

4 THE WITNESS: Well --

5 THE COURT: I'm not saying the 16 percent versus any
6 other percent. But the variation in movement and intensity of
7 movement should be greater when there's a stimulus than when
8 there's not a stimulus.

9 THE WITNESS: That's correct, and the objective
10 measure of that is whether they're statistically different from
11 one another in a meaningful way. That's what the Z-score test
12 is trying to do.

13 THE COURT: On the surface, it looked like there's a
14 big difference between 16.67 percent and 4.52 percent.

15 THE WITNESS: Yes. But the fact that there are so
16 many more non-news days than news days and because of the
17 variation within those samples, you can't say with a reasonable
18 degree of certainty that the data -- there is a difference.
19 You can only say that with a reasonable degree of certainty for
20 the post-Cole period, if you're using the pre-ARCT, post-ARCT,
21 and post-Cole period, or if you're using his intervals, which I
22 don't agree with, you would have to reject it for the
23 interval 1, and you could say that there is a meaningful
24 difference, in a statistical sense, between news days and
25 non-news days in interval 2.

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James - direct

1 THE COURT: That may statistically be true or not
2 true. I can't tell. But just as I look at this table, it
3 doesn't seem to me to support your point. I would think, as I
4 said before, different stimuli produce different consequences,
5 much more so than non-stimuli or a stimulus of minor impact.

6 THE WITNESS: Well, a couple of points. First is,
7 from a statistical standpoint, we can't reject the hypothesis
8 that they are the same. Second, that these are news events
9 that have been selected in a way that's more likely to have
10 significant price reactions, because they're not just 8-K
11 dates. There are 8-K dates in which there is an analyst
12 mentioned. Now, it's not all of the 8-K dates in which there's
13 an analyst mentioned, just some of them. If you were to go and
14 look at all of the 8-K dates in which the company makes a news
15 announcement, if you go to -- if you could flip to no. 25,
16 here's where you see that, if you do all 8-Ks like he did in
17 *Petrobras*, all 6Ks, you don't see -- it's not statistically
18 significant for pre-ARCT, post-ARCT, and the percentage of news
19 days that are significant is only 2 percent versus non-news
20 days at 5.88 percent. Similarly, for news days, there's only a
21 slight difference in the post-ARCT III time period. And again
22 in his interval 1, you have 5 percent news days significant and
23 non-news days 7.24.

24 I want to stress that this is generally a pretty easy
25 test to pass, OK. And when properly specified, it doesn't pass

H80AARC3ps

James - direct

1 for the events that he's chosen, and it doesn't pass for the
2 events that are just 8-Ks, and it doesn't pass when you include
3 news announcements with analyst coverage that he's omitted.

4 So for most of the class period, whether you use 8-K
5 dates, whether you use 8-K dates with analyst coverage, that
6 he's omitted, or whether you use 8-K dates with analyst
7 mentioned that he's included and the proper test statistic, it
8 flunks most of the time.

9 This is an easy test. This is unusual to see the kind
10 of failure rate for what is an easily passed test in most
11 instances.

12 Q. Turning back to slide 22, his Honor focused on the 16.67
13 and the 16 percent --

14 A. Yes.

15 Q. -- and that number goes up to 50 percent in the post-Cole
16 period.

17 A. Right.

18 Q. Why would there be a dramatic increase in the number of
19 movements on news days in the post-Cole period as opposed to
20 the earlier period?

21 A. Well, the conclusion I would say is that the market is more
22 responsive to news during the post-Cole period than it is
23 during the pre-Cole period.

24 Q. And to the extent that you are using the test of these
25 scores and statistical significance, who put that test forth as

H80AARC3ps

James - direct

1 the proper test to be used in this case?

2 A. It's the article that -- it's outlined in the article that
3 Dr. Feinstein references. It's in, on page 20 of the slide
4 presentation.

5 Q. And taking a look at page 20, what is it in the article
6 that leads you to say that the test as enunciated by Ferrillo
7 et al. was to be done with unequal areas?

8 A. Well, it says in the footnote that's describing the test,
9 "The test examines whether the means of two samples with
10 potentially different variances are the same." So when they're
11 explaining potentially different variances, that's allowing for
12 the variances between the news days and non-news days to be
13 different. And when you conduct the test in the way that's
14 described in the Ferrillo article, which I believe, as a
15 financial economist, is the appropriate way to do it, from two
16 of the three periods during the class period, the ARCP common
17 stock fails the test.

18 Q. And in preparing for your testimony, did you consult with
19 any of the authors of the Ferrillo study?

20 A. I did.

21 MR. DROSMAN: Objection. Calls for hearsay, your
22 Honor.

23 THE COURT: Not yet. Maybe the next question.

24 MR. DROSMAN: All right.

25 MR. EDELMAN: I want to ask the next question?

H80AARC3ps

James - direct

1 Q. Whom did you consult?

2 THE COURT: OK.

3 A. Dr. Tabak.

4 Q. Did you consult for the purpose of providing expert opinion
5 here?6 MR. DROSMAN: Objection, your Honor. This is going
7 down the hearsay track. No reason for this.

8 THE COURT: Tracks are OK.

9 Q. What if anything --

10 THE COURT: You didn't answer the question. Is it
11 yes?

12 A. Yes.

13 Q. What if anything did you learn from that conversation?

14 MR. DROSMAN: Objection, hearsay.

15 THE COURT: Sustained.

16 Q. Now, you mentioned one flaw being equal variance versus
17 unequal variance. What is the second flaw that you identified?18 A. Dr. Feinstein classifies news days based on what I will
19 refer to as a subjective and inconsistent judgment regarding
20 what constitutes a mention by analyst that is the focus of the
21 analyst report. He doesn't classify news days based on
22 objective criteria.23 So one important aspect of scientific inquiry that is
24 required is that a study be replicateable, that, as described,
25 you can replicate it. And when I tried to replicate his study,

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James - direct

1 by looking at 8-Ks for which there was also analyst commentary
2 concerning those 8-Ks, I found that he had not included 12 8-K
3 events in which there was also analyst commentary.

4 Q. Let's take a look at 24. What's reflected on that chart?

5 A. So what 24 is doing is saying, what happens when you
6 include the omitted 8-K event. So you followed his methodology
7 and include all 8-K events for which there is an analyst
8 mention or commentary of the 8-K. And what you see is, again,
9 that, for interval 1, for his intervals, or for pre-ARCT III,
10 post-ARCT III time period, it fails the test, meaning the
11 proportion of news days that are statistically significant is
12 not reliably larger than the number of non-news days.

13 Q. Now, you testified that there were some days classified by
14 Dr. Feinstein as non-news days that under his criteria should
15 have been news days. Can you give us an example of that.

16 A. Oh, sure. One example is, the company announced that it
17 was going to repurchase \$250 million of its common stock.
18 There is commentary in the analyst reports concerning the
19 repurchase of \$250 million of common stock. And at the time
20 the announcement was made, that's a big share purpose. That's
21 about an 8th of the outstanding shares. He doesn't include
22 that as a news date, even though there's an 8-K that tells you
23 that there is a \$250 million stock repurchase being approved
24 and analysts commenting on a \$250 million stock repurchase.

25 Q. And so the effect of that was that that went from being a

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James - direct

1 news day to a non-news day?

2 A. That's correct.

3 Q. How many instances of that did you find?

4 A. 12.

5 Q. And this chart reflects correction for those issues.

6 A. That's correct.

7 Q. Let's take a look at chart 25. Tell us what you are
8 showing in chart 25.

9 A. Well, if you look at all 8-Ks, instead of looking at 8-Ks
10 in which there is analyst mention, one concern I have about
11 looking at 8-Ks in which there is analyst mention is,
12 oftentimes, analysts will write up something based on observing
13 a price movement. So the price moves, the analyst makes a
14 commentary. If you're really wanting to ask, is news getting
15 incorporated into the stock in a consistent and reliable way,
16 as he did in other cases, you look at all 8-Ks. And when you
17 look at all 8-Ks, again, you find that ARCP's common stock
18 fails this test for two thirds of the class period in the
19 alternative subperiods or in his interval 1.

20 And as you can see, in some instances you find more
21 significant non-news days than news days.

22 Q. An example of that would be the pre-ARCT III period?

23 A. Yes.

24 Q. Can you point that out to the Court.

25 A. Yes. So there's 2.08 percent news days are significant

H80AARC3ps

James - direct

1 versus 5.88 non-news days being significant. Or in his
2 interval 1, 5 percent of the news days were significant versus
3 7.24 of the non-news days.

4 Q. And you mentioned earlier this was an easy test to pass.

5 A. Right.

6 Q. To the extent that these markets were truly efficient,
7 would you expect them to have any problems passing if all 8-K
8 days were considered?

9 A. No. I wouldn't expect there to be any problem testing. I
10 think it's a very easy test to pass because it's not asking the
11 question, for example, is the stock price moving in the
12 direction that's appropriate given the news. It's simply
13 asking if there's news are there price reactions more
14 frequently than when there's non-news.

15 Q. Under this test, to the extent that a stock price moves
16 opposite the expected price reaction for an AFFO result, would
17 that count as a yes or a no with respect to that news day?

18 A. It counts as a yes. So if, as you remember, February 2013,
19 where the price reaction is in the opposite direction of what
20 the earning surprise is, that still gets counted in this test
21 as a significant price movement.

22 Q. Let's move to the question of the preferred stock and the
23 notes. What are your views about Dr. Feinstein's analysis of
24 the preferred stock and notes?

25 A. Well, in terms of his empirical analysis of cause and

H80AARC3ps

James - direct

1 effect, he's looking at a single day, the October 29, 2014,
2 which, as I mentioned earlier, cannot be a test of market
3 efficiency throughout the class period or the period under
4 which the notes and the preferred stock are trading. He does
5 not conduct the collective-event study analysis. So he doesn't
6 offer any evidence whatsoever as to a cause-and-effect
7 relationship on any day in the class period other than October
8 29, 2014.

9 Q. And what's your view as to whether the October 29, 2014
10 analysis he did is useful in establishing market efficiency
11 during the class period?

12 A. I don't think it's informative of market efficiency during
13 the class period, both because it's just looking at one day at
14 the end of the class period where prior there's a negative
15 price reaction. And, second, he's basically saying, look,
16 information that might impact the common stock is not likely to
17 be value-relevant for these other securities and so I can't
18 really look at a cause-and-effect relationship for these other
19 securities during the class period, other than October 29,
20 2014.

21 Q. Let's turn to slide 29. Were there any structural
22 impediments to efficiency in the market for ARCP notes that you
23 identified?

24 A. Yes, there were. And I think they talked about these this
25 morning. The trading in the notes is different than the

H80AARC3ps

James - direct

1 trading in the stock. The trading in the notes are on an
2 over-the-counter market, and as a result, as a market
3 participant, you don't have the kind of transparency that you
4 need. And transparency means, pre-trade, can I observe who's
5 willing to buy, what the bids and the asks are in the
6 marketplace. And the answer is, for the notes trading over the
7 counter, the answer is no.

8 THE COURT: Why is that?

9 THE WITNESS: It's just the nature of the market that
10 the notes trade in. It doesn't have that transparency. You
11 can't see quotes being -- on the various books of the brokers.

12 THE COURT: Do they get quoted once a day?

13 THE WITNESS: So, for some of the notes they do. So
14 that's a figure I have that's called the TRACE database, and
15 TRACE records prices. That gives you what's called post-trade
16 transparency. So I know what people traded at, OK. But if I'm
17 going to submit a bid for a particular bond, say I want to buy
18 a bond, I don't know what the current bids or asks for the
19 bonds are.

20 THE COURT: You just see the last prices.

21 THE WITNESS: I just see the last prices.

22 THE COURT: But if you know the last prices, it's
23 always an indication of what the next price might be.

24 THE WITNESS: Well, there might be price movement.

25 THE COURT: So you can test it.

H80AARC3ps

James - direct

1 THE WITNESS: Yes. The other thing --

2 THE COURT: You also know who's buying and selling.

3 THE WITNESS: No, you don't know that.

4 THE COURT: You don't know that.

5 THE WITNESS: Yeah.

6 THE COURT: But if you're on the market, you tend to
7 know who's buying the stock.

8 THE WITNESS: You -- the -- there isn't that type of
9 transparency. What you don't see is who's willing to buy or
10 willing to sell.

11 THE COURT: You have a statement of history and it's
12 not so clear.

13 THE WITNESS: Exactly.

14 THE COURT: But if you're around the market, you tend
15 to know who have been the buyers and who have been the sellers.

16 THE WITNESS: Exactly, except for one thing. For most
17 of the bonds here, for most of the class period, they're 144As,
18 so you don't --

19 THE COURT: It's a private deal.

20 THE WITNESS: They're private placement. So for
21 144As, you don't have post-trade transparency until June 30,
22 2014. And that transparency is with a 15-minute delay.

23 So you don't have the kind of transparency in the 144A
24 notes. And FINRA basically says, when it began posting with a
25 delay the TRACE data for 144A, they describe it as, the

H80AARC3ps

James - cross

1 addition of post-trade transparency, as bringing transparency
2 to a market that's previously operated in the dark. Markets
3 that operate in the dark are not typically conducive to market
4 efficiency.

5 Q. Dr. James, I'd like to just spend a few moments addressing
6 Dr. Feinstein's proposed damages methodology. He we can turn
7 to slide 32?

8 THE COURT: That hasn't been touched on yet. There's
9 been no direct on that.

10 MR. EDELMAN: You want us to do that separately?

11 THE COURT: Yes.

12 MR. EDELMAN: Then I will pass the witness.

13 CROSS-EXAMINATION

14 BY MR. DROSMAN:

15 Q. Dr. James, let's talk about your conclusions, or your lack
16 of conclusions as it might be, in this case. You never
17 conclude that the market for ARCP common stock during the class
18 period is not, underline not, efficient, correct?

19 A. No. My testimony is -- and as I understand it the
20 plaintiffs have the burden to show efficiency and that for the
21 common stock, using the test that Dr. Feinstein has proposed,
22 it fails through most of the class period.

23 Q. Let me ask you the question again. I don't think I
24 received an answer. You never concluded --

25 THE COURT: I think he did answer. He said that that

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James - cross

1 wasn't his focus. His focus was showing deficiencies in
2 Dr. Feinstein's report.

3 Q. You never conclude that the market for ARCP preferred stock
4 during the class period was not efficient --

5 THE COURT: Same point, Mr. Drosman. Don't make
6 rhetorical points. I have it. His focus is to impeach what
7 Feinstein said. He's not giving positive testimony.

8 MR. DROSMAN: Fine, your Honor.

9 Q. Let's discuss the *Cammer* factors. It's fair to say that
10 your criticism of Dr. Feinstein focuses almost exclusively on
11 *Cammer* factor number five, correct?

12 A. I think that that is correct, that the four other *Cammer*
13 factors that we've talked about, from a financial economist's
14 perspective, are indirect evidence, and I think Dr. Feinstein
15 concludes this as well, that is conducive to market efficiency
16 but is not in and of itself evidence of market efficiency.

17 Q. And it's fair to say that you don't contest Dr. Feinstein's
18 conclusion that the first four *Cammer* factors, the, as you call
19 them, indirect evidence of market efficiency, was satisfied,
20 correct.

21 A. Well, I do, in the sense that, while there's -- the *Cammer*
22 factors lay out some legal standards for, for example, daily --
23 weekly trading --

24 THE COURT: Let me cut through this because we're
25 wasting time. He divided the period of the class into three.

H80AARC3ps

James - cross

1 In the first period, he testified that there was a very thin
2 capitalization, a micro cap, he said. The second, there was a
3 more widespread capitalization, third period even more so. So
4 to that extent, his testimony affects all five of the *Cammer*
5 factors.

6 MR. DROSMAN: That's not true, your Honor. That's
7 *Krogman* factor two. The *Cammer* factors deal with different
8 things: average weekly trading volume, eligibility to file an
9 S-3. We've got, the second *Cammer* factor is analyst coverage.

10 THE COURT: Do you have any opinion on the average
11 weekly trading volume of the stock in the three periods that
12 you identified?

13 THE WITNESS: Yes. The average trading volume in the
14 stock goes up during -- from period 1, 2, and 3. If you use
15 what I think is an artificial standard like 1 or 2 percent of
16 the overall volume outstanding, it will pass that standard.

17 THE COURT: For all three?

18 THE WITNESS: For all three. But --

19 THE COURT: What about the number of securities
20 analysts following and reporting on the stock?

21 THE WITNESS: There's no clear dividing line there.
22 There are two analysts for most of the class period that are
23 following the stock. Only --for most of the earnings --

24 THE COURT: And probably a number of others following
25 the two.

H80AARC3ps

James - cross

1 THE WITNESS: No. Just -- so you start the class
2 period, OK, with two analysts, OK. On most earnings dates,
3 only one analyst is providing a forecast. You end the class
4 period with, I think, ten or 12 analysts following the stock.
5 So that's changing during the class period.

6 THE COURT: So if you have two analysts following the
7 stock throughout, is that a satisfaction or not a satisfaction
8 of the *Cammer* factor?

9 THE WITNESS: I think that it's -- again, there's no
10 bright line. So you look at things like, is there -- what are
11 the analysts --

12 THE COURT: You look at how much reputation the
13 analysts have and how frequently they report.

14 THE WITNESS: Right. And what they're reporting. And
15 if the analysts are reporting, as these two do, that, hey, this
16 is an illiquid stock, without institutional involvement, that
17 tells you that those analysts, while they're following the
18 stock, are pointing out impediments to information getting
19 embedded into the share price.

20 THE COURT: The third is the extent --

21 MR. DROSMAN: Your Honor, it's important that we go
22 back to the second factor. He told me at his deposition that
23 he never evaluated the second factor, right.

24 (Mr. Edelman rose)

25 THE COURT: Ask him.

H80AARC3ps

James - cross

1 Q. Did you ever evaluate the second factor?

2 THE COURT: What's the matter, Mr. Edelman?

3 MR. EDELMAN: I just, I'd like to get a question.

4 THE COURT: He's just asking it.

5 MR. EDELMAN: Well, I was wincing before I got the
6 question.

7 THE COURT: OK. Sit down and relax, and Mr. Drosman
8 will now ask the question.

9 BY MR. DROSMAN:

10 Q. You never evaluated *Cammer* factor number two, did you, sir?

11 A. I didn't make a conclusion as to whether it passed or
12 failed *Cammer* factor two. As I indicated in my deposition,
13 there's no clear dividing line. If you have one analyst
14 providing an analyst -- a forecast, even your expert says, when
15 there was one analyst following the stock, he wasn't
16 comfortable concluding the market was efficient.

17 Q. I'm going to show you your deposition. We're going to mark
18 it as Plaintiff's Exhibit 3.

19 THE COURT: You don't have to mark it.

20 "At such and such a date, were you asked the following
21 question" --

22 Q. On August 1, 2017, you were deposed, right, sir?

23 A. Yes.

24 Q. And at that deposition you swore to tell the truth.

25 MR. DROSMAN: May I approach, your Honor?

H80AARC3ps

James - cross

1 THE COURT: Relax. Just ask a question.

2 Were you asked the following question and did you give
3 the following answer?

4 MR. DROSMAN: Should I provide him with a --

5 THE COURT: No, just go back to where you're
6 questioning him.

7 MR. DROSMAN: OK.

8 THE COURT: Don't be so intense.

9 MR. DROSMAN: Well, it's difficult to sit here and
10 listen to what I know --

11 MR. EDELMAN: Objection.

12 THE COURT: You're experienced as a lawyer. You know
13 how to listen.

14 BY MR. DROSMAN:

15 Q. OK. I'm looking at page 193 of your deposition on August
16 1, 2017, and on that day --

17 THE COURT: Page --

18 Q. Page 193, line 12 of your deposition. And on that day, you
19 were asked:

20 "Q. My question is, did you conclude that *Cammer* factor number
21 two was not satisfied?"

22 Your response: "I didn't. I wasn't asked to evaluate
23 it."

24 Is that your testimony, sir?

25 A. Yes.

H80AARC3ps

James - cross

1 MR. EDELMAN: Well, wait. That's just the beginning
2 of the answer.

3 THE COURT: Gentlemen, I have it.

4 Q. So you weren't asked to evaluate *Cammer* factor --

5 THE COURT: He just said he wasn't. All right. Move
6 on.

7 Q. With respect to *Cammer* factor number three, you didn't do
8 any analysis to quantify the number of market makers, correct?

9 A. That's correct.

10 Q. And you also never addressed Dr. Feinstein's conclusion
11 that there was extensive news coverage of ARCP during the class
12 period, did you?

13 A. No.

14 Q. With respect to *Cammer* factor number four, that's
15 eligibility to file a form S-3, right?

16 A. That's correct.

17 Q. You didn't do any analysis to determine whether ARCP was
18 eligible to file a form S-3 during the class period; is that
19 right?

20 A. Correct.

21 Q. And you don't disagree with Dr. Feinstein's conclusion that
22 ARCP was eligible to file a form S-3 from August 1, 2012 until
23 the end of the class period, correct?

24 A. That's correct.

25 Q. *Cammer* factor number five is empirical effect showing a

H80AARC3ps

James - cross

1 cause-and-effect relationship between unexpected news and an
2 immediate response to the stock price, right?

3 A. Yes, a cause-and-effect relationship.

4 Q. And you understand that Dr. Feinstein performed an event
5 study with respect to this factor, right?

6 A. That's correct.

7 Q. And he ran a regression analysis, right?

8 A. That's correct.

9 Q. And you understand that Dr. Feinstein concluded that *Cammer*
10 factor number five is satisfied, right?

11 A. Yes. I agree that he concluded that. I don't agree with
12 his conclusion.

13 Q. Right. And you understand that he used equal variances in
14 his Z-score, right?

15 A. Incorrectly, yes.

16 Q. You believe it's incorrect, right?

17 A. That is correct, as to the authors of the article that he
18 cites.

19 THE COURT: Objection, your Honor. I move to strike.

20 MR. DROSMAN: Sustained.

21 Q. Sir, just answer my question if you could. You understand
22 that all the charts that you provided to this Court during your
23 direct examination, the Z-score was followed by the parens
24 "unequal variances," right?

25 A. That's correct.

H80AARC3ps

James - cross

1 Q. You didn't use equal variances, right?

2 A. I have used equal variances.

3 Q. You didn't use equal variances in this particular test that
4 you performed here, did you?

5 A. That's correct.

6 THE COURT: I don't understand what that means.

7 Q. I think that the best person --

8 THE COURT: Ask.

9 Q. So equal variances --

10 THE COURT: What do "equal variances" mean?

11 THE WITNESS: That you assume that the variance
12 between the two samples, for news dates and non-news dates, are
13 equal, which would be a standard assumption if you were doing a
14 two-tailed test looking at proportion. When you're using a
15 one-tailed test looking at proportions, the appropriate test
16 statistic is unequal variance because --

17 THE COURT: "One tail" means one event?

18 THE WITNESS: "One tail" means that you're saying, so
19 think about a test in which you were saying, I'm going to
20 compare the average heights of men and women. OK. One way to
21 hypothesize that is, there's no difference, versus, there is a
22 difference. That would be a two-tailed test. A one-tailed
23 test would say, I'm going to test whether men are taller than
24 women, OK, against the null that there's no difference or
25 they're smaller.

H80AARC3ps

James - cross

1 THE COURT: What's the question here?

2 Q. The question is --

3 THE COURT: Not, not -- what's the question here?

4 THE WITNESS: The question here as he's formulated it
5 is equivalent to, are men taller.

6 THE COURT: Not equivalent. What is the test here?
7 What's the question he's asking?

8 THE WITNESS: He's asking, is the proportion of
9 significant news days greater than the proportion of
10 significant non-news days. So the null hypothesis is no
11 difference or less than.

12 THE COURT: In proportion to what?

13 THE WITNESS: Proportion of all days in which there is
14 news, a significant price reaction.

15 THE COURT: So it's the proportion of greater news
16 days to all days and the proportion of non-greater days to all
17 days.

18 THE WITNESS: So the proportion of news days for which
19 there is a significant price reaction.

20 THE COURT: You're saying they should be equal?

21 THE WITNESS: He's saying that they should be equal or
22 less, is the null hypothesis, versus the alternative, that
23 they're greater.

24 And that requires --

25 THE COURT: And for concluding, if you can, on the

H80AARC3ps

James - cross

1 issue of market efficiency, is it the greater, the more
2 efficient, or is it the more equal, the more efficient?

3 THE WITNESS: Well, if you're testing the hypothesis,
4 you're testing, is it more likely on news days against the
5 alternative, that if the market were inefficient you might
6 observe more frequent significance during non-news days or no
7 difference between the two.

8 THE COURT: I'm not following.

9 THE WITNESS: OK.

10 THE COURT: If there's more movement of stock price on
11 a news day proportionally to all, than on a non-news day,
12 that's an indication of greater efficiency, is it not?

13 THE WITNESS: Not unless you can say, with a
14 reasonable degree of certainty, that that greater frequency is
15 not by chance, meaning that you can say --

16 THE COURT: Other things being equal.

17 THE WITNESS: You need to say with confidence that
18 there is a meaningful difference between the two.

19 THE COURT: Got it. OK.

20 THE WITNESS: Just as if you're eval --

21 THE COURT: I got it, I got it. Continue.

22 BY MR. DROSMAN:

23 Q. And you understand that Dr. Feinstein tested a null
24 hypothesis, right?

25 A. Yes.

H80AARC3ps

James - cross

1 Q. And you've already told us that the null hypothesis is that
2 the difference between the news days and the non-news days will
3 be the same or less, right?

4 A. That's correct, as opposed to what typically is done, which
5 is saying there's no difference between the two.

6 Q. Let's see. The first four *Cammer* factors, if the first
7 four *Cammer* factors were met but the fifth --

8 THE COURT: I think you've got all the points you
9 want.

10 MR. DROSMAN: What's that?

11 THE COURT: You've got all the points you want, that
12 he didn't do any study on points one through four and on five
13 you challenged them. So what do you need?

14 MR. DROSMAN: Well, here's what I'd like to ask:

15 Q. If the first four *Cammer* factors were met but the fifth
16 *Cammer* factor was not satisfied, you would not opine that a
17 market is efficient, correct?

18 A. I would say that that would be evidence that would be
19 inconsistent with market efficiency, certainly in the context
20 of finding additional evidence by market participants that
21 there are impediments to information flows that exist in this
22 case.

23 Q. At your deposition, at page 185, lines 9 through 16, you
24 were asked:

25 "Q. What I'm asking you, sir, is that if the first four *Cammer*

H80AARC3ps

James - cross

1 factors were satisfied and the fifth factor is not, can a
2 market be efficient for a particular security, in your expert
3 opinion?"

4 Response: "I would not opine that the market is
5 efficient if the first four *Cammer* factors were met and the
6 evidence was that the security failed the fifth *Cammer* factor."

7 Is that correct, sir?

8 A. Yes.

9 Q. You also said that the comments do not rely on indirect
10 tests, like the first four *Cammer* factors, to determine market
11 efficiency, right?

12 A. That's typically the case, yes.

13 Q. The first four *Cammer* factors are considered indirect
14 evidence of market efficiency, right?

15 A. That's correct.

16 Q. And the three top *Krogman* factors are also considered
17 indirect evidence of market efficiency, right?

18 A. I think they're -- and let me just correct my prior answer.
19 I think they're considered to be indirect evidence of
20 conditions that may be conducive to market efficiency, not
21 evidence of market efficiency itself, because market efficiency
22 is defined, as we've talked about, as a, does the price of the
23 security react to all value-relevant information rapidly and
24 accurately.

25 Q. So I take it that you agree with the Second Circuit's

H80AARC3ps

James - cross

1 *Petrobras* decision that there should be no evidentiary
2 hierarchy between --

3 THE COURT: That's not a good question.

4 MR. DROSMAN: I think it's important, your Honor,
5 because I think --

6 THE COURT: It may be important, but it's not a
7 competent question.

8 Q. Let me ask you this. Do you agree that there should be no
9 evidentiary hierarchy between direct evidence and indirect
10 evidence of market efficiency.

11 (Mr. Edelman rose)

12 THE COURT: Objection sustained.

13 I think you're finished, Mr. Drosman.

14 MR. DROSMAN: Well, let me talk about his regression
15 analysis, your Honor, very briefly, if I could. It relates to
16 Cammer factor number five.

17 Q. You heard Dr. Feinstein's testimony concerning your
18 application of his regression results to your three study
19 periods, right? You read that deposition testimony?

20 A. Yes.

21 Q. And if you take a look at Exhibit 2 to your report, which
22 is in evidence, you see that your first subject here is called
23 the pre-ARCT III period, right?

24 A. Yes.

25 Q. And it's 201 days long. Is that correct?

H80AARC3ps

James - cross

1 A. Yes.

2 Q. And you would agree with me there is a footnote on Exhibit
3 No. 2 to your report that says that you relied on
4 Dr. Feinstein's interval-1 event study regression results for
5 your pre-ARCT III sub period, correct?

6 THE COURT: Slow down, Mr. Drosman. You're speaking
7 faster than I can absorb, and even though Paula is an
8 extraordinary reporter and is probably faster --

9 MR. DROSMAN: I'm sorry. I'll ask the question more
10 slowly.

11 Q. You would agree with me that footnote no. 2 to your report
12 says that you relied on Dr. Feinstein's interval-1 event study
13 regression results for your pre-ARCT III subperiod, correct?

14 A. That's correct. So what I'm doing is, I am identifying
15 days during the pre-ARCT III time period that Dr. Feinstein has
16 concluded have statistically significant price reaction.

17 Q. So it's correct that you used Dr. Feinstein's regression
18 results for a period of 321 days and relied on those results
19 for your 201-day pre-ARCT III subperiod. Correct?

20 A. No. I'm just identifying dates that your expert has
21 identified as statistically significant using his interval 1.
22 And as I indicated in my deposition, I'm doing that in part
23 because --

24 THE COURT: We're not getting anywhere, Mr. Drosman.
25 I think you're finished.

H80AARC3ps

James - redirect

1 Anything on direct?

2 MR. DROSMAN: Your Honor, I have more that I could --

3 THE COURT: I understand, but you're wasting time.

4 You're making debatist points rather than providing useful
5 information.

6 MR. DROSMAN: Well, I have a demonstrative exhibit
7 that I think would show your Honor why this is really
8 problematic.

9 THE COURT: What is really problematic?

10 MR. DROSMAN: What his use of Dr. Feinstein's
11 interval-1 regression analysis for a shorter period is
12 problematic.

13 THE COURT: I don't really care.

14 MR. DROSMAN: It impacts his entire results.

15 THE COURT: Go ahead, Mr. Edelman.

16 REDIRECT EXAMINATION

17 BY MR. EDELMAN:

18 Q. Dr. James, you were asked whether you had done the analysis
19 using both equal variance and unequal variance at any point in
20 your report.

21 A. That's correct.

22 Q. I just wanted to review, do you have your report in front
23 of you?

24 A. I do.

25 Q. Can you take a look at Exhibits 2, 4, and 5 of your report.

H80AARC3ps

James - redirect

1 MR. EDELMAN: Does the Court have it, your Honor?

2 THE COURT: I do, but I'm not going to be able to
3 follow so many exhibits at one time.

4 MR. EDELMAN: OK. Let's start with Exhibit 5.

5 A. You say Exhibit 5?

6 Q. Yes.

7 A. OK.

8 MR. EDELMAN: Do you want us to hand it up?

9 THE COURT: I have it. You just did Feinstein
10 Exhibit 10.

11 MR. EDELMAN: Right.

12 Q. That's the analysis you did if you used all the 8-Ks as
13 opposed to a selection.

14 A. That's correct.

15 Q. Did you do the analysis using both equal variance and
16 unequal variance?

17 A. I did.

18 Q. And can you show the Court where that is?

19 A. So if you look in the bottom two boxes, so Z-score assuming
20 equal variance and Z-score assuming unequal variance, and then
21 there's statistical significance, if you used either test for
22 all of the 8-Ks, ARCP's common stock fails the test for
23 Feinstein's interval 1 and it fails the test for the pre-ARCT
24 III period and the post-ARCT III period.

25 THE COURT: What are we proving here? And understand

H80AARC3ps

James - redirect

1 it in my terms. You say you would expect that there be an
2 equal variance as between the proportion of non-event days to
3 total 8-Ks and event days to total 8-Ks?

4 THE WITNESS: No. What I'm saying is that you can --
5 there is a -- the test statistic is constructed either
6 assuming -- what you do is pool all the data and say the
7 variance for all of the data is the same, versus, is there a
8 difference in the variance between the news days and the
9 non-news days.

10 THE COURT: Feinstein said they were variable.

11 THE WITNESS: He's saying, I'm going to assume that
12 they're all the same, for my test statistic. I'm going to
13 assume equal variance to the two groups. All right. I'm
14 saying that isn't the way you've structured your test. That's
15 not what the article says to do. That's not what statistics
16 texts --

17 THE COURT: I may be mistaken, but I don't think he
18 said that.

19 THE WITNESS: Well, that's what it means to employ an
20 equal variance, that you're saying --

21 THE COURT: Can I get Feinstein sitting up here and
22 ask.

23 MR. EDELMAN: Time? It's time?

24 THE COURT: Yes.

25 MR. EDELMAN: Do you want me to sit down?

H80AARC3ps

James and Feinstein

1 THE COURT: You can stand up.

2 Dr. James, go in the jury box.

3 THE COURT: You are under oath, Dr. Feinstein.

4 WITNESS FEINSTEIN: I understand.

5 CHRISTOPHER JAMES and STEVEN P. FEINSTEIN, As witnesses
6 together.

7 THE COURT: All right. Will you comment.

8 WITNESS FEINSTEIN: The null hypothesis of the test is
9 that -- actually as a preliminary matter, I want to ask this,
10 or state this.

11 THE COURT: Actually, I would like the two of you to
12 talk. Talk to each other. This is an innovation that has been
13 worked through the Australian courts.

14 WITNESS JAMES: I've participated in that.

15 THE COURT: Have you?

16 WITNESS JAMES: Yeah. I've been in the hot tub.

17 THE COURT: So a student who had interned here and
18 written a major paper there had interviewed me. And I had used
19 a form of this before in the 9/11 cases, but not too much. But
20 I've had another experience having to do with Mexican law,
21 where I have had experts from either side and I was
22 dissatisfied with the contentiousness that was brought by the
23 question by lawyers. I had the experts talking to each other,
24 which I found to be very helpful. And so I'd like to do that
25 here.

H80AARC3ps

James and Feinstein

1 WITNESS JAMES: OK.

2 WITNESS FEINSTEIN: Interesting.

3 If you're willing to concede or stipulate that the
4 variance for price movements for news days is greater than the
5 variance of price movements for non-news days, then there's no
6 need to even run the test that they were done. That would
7 prove that there's an impact of information on the stock
8 prices.9 THE COURT: So that means that you're not positng
10 equal variation. You're positng unequal variation.

11 WITNESS FEINSTEIN: If that's the concern.

12 THE COURT: What were you doing? Were you positng
13 unequal variation?14 WITNESS FEINSTEIN: I constructed my Z-statistic using
15 the equal-variance formula, because that was the more
16 conservative. I did testing, diagnostics, simulations to show
17 that that was the more conservative way to run the test, with
18 the equal variance, because, under the null hypothesis that the
19 news days have equal or less variance than the general
20 population, using the general population variance would be
21 bigger than the news day variance, and so using that general
22 population of all news-day variance would be the bigger number
23 and the Z-statistic construction would be more conservative.
24 So that was the appropriate way to run the test as I saw it.

25 THE COURT: Dr. James.

H80AARC3ps

James and Feinstein

1 WITNESS JAMES: He's talking about a conservative test
2 in which you make it easier to pass.

3 THE COURT: Look at each other.

4 WITNESS JAMES: Yes.

5 You're talking about a test in which it's easier to
6 pass. My question to you is, you read the Ferrillo article.
7 You knew what -- you reference it. And you know that they were
8 using unequal variance. And you know from textbooks that
9 that's the way to do it. But you didn't do it here. And you
10 are not running a two-tailed test. You're not saying, the news
11 days, non-news days, are different from one another versus
12 they're the same. You're running a one-tailed test. And you
13 know that when you run a one-tailed test, the significance
14 level that you need to get is 1.67, not 1.95. And will you
15 agree that if you had done a two-tailed test in your analysis,
16 OK, against a null, that there's no difference, that it would
17 fail your test during your interval 1 and during my ARCT III,
18 pre-ARCT III period and the post-ARCT III period. It would
19 fail under a two-tailed test. Will you agree with that?

20 WITNESS FEINSTEIN: Well, a one-tailed test is the
21 appropriate test.

22 WITNESS JAMES: No. Would it fail?

23 THE COURT: Don't talk over each other.

24 WITNESS FEINSTEIN: The one-tailed test is the
25 appropriate test to run, and I didn't see any criticism of that

H80AARC3ps

James and Feinstein

1 in your report. If you do run it as a two-tailed test, meaning
2 you're testing the hypothesis that news days have less
3 significance --

4 WITNESS JAMES: No, no. That's not a two-tailed test.
5 You're basically saying --

6 WITNESS FEINSTEIN: Then it's different, OK, under a
7 two-tailed test.

8 THE COURT: I think we're dealing with a lot of
9 different concepts and there could be disagreement. We're not
10 going to get very far unless you allow each person to finish.

11 WITNESS JAMES: OK.

12 THE COURT: And then you can try to fix up the
13 different parts.

14 WITNESS FEINSTEIN: A one-tailed test is the
15 appropriate test to run, and the Z-statistic as I constructed
16 it is the appropriate Z-statistic. If I had run the test
17 inappropriately -- and there's myriad ways of running the test
18 inappropriately -- it would fail, it would be uninformative.

19 But I looked at Dr. Tabak's reports that he submitted
20 to courts and I saw that he ran the test identical to the way I
21 did. He used the Z-statistic constructed under the assumption
22 of equal variance, not unequal variance. The article that you
23 pointed to and put the demonstrative up had a cryptic footnote
24 that you highlighted, but it never did say construct the
25 Z-statistic using an assumption of unequal variance.

H80AARC3ps

James and Feinstein

1 WITNESS JAMES: How could you conduct a Z-statistic to
2 allow the variances to be different unless you were running a
3 Z-statistic with unequal variances?

4 WITNESS FEINSTEIN: Exactly the way I did it. I ran
5 simulations and did calculations to show that running it with
6 the equal-variance assumption was the more conservative way of
7 running the Z -- the more conservative way -- let's not talk
8 over each other.

9 WITNESS JAMES: No.

10 WITNESS FEINSTEIN: Is the more conservative way of
11 running the test.

12 The reason why it's really important not to run it
13 your way with the unequal-variance statistic -- and this is in
14 the textbooks that you cite -- is it eviscerates the power of
15 the test. It makes the test likely to not find a significant
16 result when in fact the truth is a significant result. It
17 creates what's called type 2 error, which is the error that the
18 testing too weak to find the actual effect.

19 And the reason why, the analytical reason why it
20 eviscerates the power of the test is, under -- when the results
21 come back and show that there's higher, greater movement among
22 the news days, that greater movement causes the Z-statistic as
23 you constructed it to be inflated, above what would be the
24 appropriate -- the variance, I'm sorry, the variance to be
25 inflated, so that the Z-statistic would be too low.

H805arc4

JAMES and FEINSTEIN.

1 THE COURT: What is the Z-statistic?

2 WITNESS FEINSTEIN: The Z-statistic is the
3 mathematical formula that gives the scientific basis for the
4 test. The data are fed into a formula. The formula value is
5 then compared to tables that indicate how likely, what the
6 probability is of observing this kind of data and this kind of
7 Z-statistic under various hypotheses.8 THE COURT: Is it a threshold of statistical
9 significance?10 WITNESS FEINSTEIN: Yes. It determines the threshold
11 for statistical significance. And running it your way it
12 eviscerates the power of the test. It makes it so that the
13 test will not find significance.

14 THE COURT: The last word, Doctor.

15 WITNESS JAMES: What he is basically saying is that if
16 you run the test using the unequal variants, which is what the
17 article that he cites uses, that it will fail most of the time.
18 We disagree on a fundamental point which is when you are using
19 a one-tailed test where the hypothesis --

20 THE COURT: One tailed-test means?

21 WITNESS JAMES: That you are only going to look at the
22 right part of the distribution so you are going to have a lower
23 critical value for the Z instead of --24 THE COURT: So the difference is that Feinstein uses a
25 sample of what he considers news days that result in price

H805arc4

JAMES and FEINSTEIN.

1 movement and you argue that that's an inappropriate sample.

2 WITNESS JAMES: That's one criticism. The second
3 criticism --

4 THE COURT: And he justifies that by saying that I'm
5 trying to measure movement and so I can't mix in where there is
6 no movement and where there is movement, or where there is
7 analyst comment or where there is no analyst comment. And my
8 observation is that the statistics are intended to prove a
9 predictive result and therefore they're flawed because they're
10 flawed by looking for the prediction that you are trying to
11 prove.

12 WITNESS JAMES: Exactly.

13 THE COURT: However, they're indicative.

14 I think I would come out with this, folks, in terms of
15 a finding:

16 I don't have enough scientific basis to identify that
17 which is statistically appropriate and that which is not
18 statistically appropriate. I am not able to say that one way
19 of looking at this for statistical or scientific measure is
20 better than another way, and I have to look at it in terms of a
21 whole, looking at it as a whole. This fifth factor was tested
22 to show that an event, an 8-K which excited commentary from
23 analysts, resulted in a price movement that was statistically
24 significant, that is to say was measurable, that looked to be
25 greater than the absence of equal movement on a non-event day,

H805arc4

JAMES and FEINSTEIN.

1 that is to say an event which, although started by an 8-K, did
2 not excite analyst commentary. It is a proposition that is
3 either self-evident or will cause us to spend endless time in
4 trying to devise scientific formulas for measuring but
5 intuitively, if things excite analysts and analysts excite
6 price movement, there is a measure of efficiency in the market.
7 To what degree, I am unable to say.

8 Given this evaluation on my part and the indication
9 that comes out for both sides that the first four factors of
10 the Cammer case are satisfied, I come to the conclusion that
11 there is requisite degree of efficiency in the market for ARCP
12 common stock, namely that the alleged misrepresentations
13 affected ARCP's stock price partially or entirely throughout
14 the period.

15 I then come to two other questions that I have to
16 answer, one is whether this is the case for the entire period;
17 and second, whether this conclusion is applicable to debt and
18 preferred stock.

19 Now, the division of the class period into two based
20 on this internal management factor, I think, is artificial and
21 inappropriate and I think the analysis of Dr. James, showing a
22 tripartite division is more appropriate for our purposes. And
23 then the question is partly practical and partly factual. If
24 there is to be a class certification for at least the last
25 third and probably the last two thirds of this three-part

H805arc4

JAMES and FEINSTEIN.

1 period, that is, for the period after the ARC III merger -- and
2 that would be a date, Ms. Wyman, that would be?

3 MS. WYMAN: I think it is February 28, 2013.

4 THE COURT: -- and thereafter, practically speaking
5 there is no reason now to divide the class into two and say
6 part is class and part is non-class.

7 This is a decision that I think should be deferred.
8 And part of my justification for deferring this decision and
9 moving along on the finding that the class period should cover
10 the entire period from May 9, 2012 to October 29, 2014, is the
11 proposition stated by Dr. Feinstein that there were numerous
12 analysts -- maybe numerous is bad, apparently there are only
13 two, but -- there were lots of news commentary and lots of
14 following of the stock, and although that alone is not
15 sufficient to make for an efficient market, it is a sufficient
16 indication that a certification of the class for part of this
17 period should extend for the entire period.

18 We don't have any statistical measurements for average
19 weekly trading volume in this early period. I don't think
20 that's in the record, is it Ms. Wyman?

21 MR. DROSMAN: Your Honor, I was going to elicit this
22 on cross-examination. There is statistics for the first
23 period's average weekly trading volume, it is over 2 percent.

24 THE COURT: So it is marginally accurate.

25 MR. DROSMAN: Cammer says that is persuasive evidence

H805arc4

JAMES and FEINSTEIN.

1 of sufficiency.

2 THE COURT: The numbers of securities analysts
3 following and reporting on the stock, even though there are
4 two, these people followed it continuously and I think from the
5 beginning of the period; is that right?6 MS. WYMAN: From the beginning of our class period;
7 that's right, your Honor.

8 THE COURT: So, again, that's indicative.

9 The extent to which market makers and arbitragers
10 trade in the stock, what is the basis of that?11 MS. WYMAN: The basis for that, I think Dr. Feinstein
12 testified, were -- the basis for the market makers were data
13 that he got from --

14 WITNESS FEINSTEIN: Nasdaq.

15 MS. WYMAN: Nasdaq.

16 THE COURT: How far back?

17 WITNESS FEINSTEIN: All the way. All the way since
18 the IPO.

19 THE COURT: Since May 9, 2012?

20 WITNESS FEINSTEIN: May 9 was class period and it was
21 listed on Nasdaq as of that date. It was listed on Nasdaq
22 prior to that date.

23 THE COURT: So, that's another indicator.

24 There is eligibility, I think you testified, from
25 August 1, 2013.

H805arc4

JAMES and FEINSTEIN.

1 WITNESS FEINSTEIN: '12.

2 THE COURT: Pardon?

3 WITNESS FEINSTEIN: August 1st, 2012.

4 THE COURT: Sorry.

5 And, the last factor we have already talked about.

6 As to the factors under the Krogman case, the company
7 capitalization, although much smaller, didn't have -- how much
8 capitalization?9 MS. WYMAN: I think at the very beginning of the class
10 period it was \$75 million and within a few weeks it was up
11 above \$100 million for the common stock.12 THE COURT: The relative size of the bid-ask spread
13 for the security?

14 WITNESS FEINSTEIN: Narrow from the very beginning.

15 THE COURT: And the company's float, and that changed
16 a substantial amount.17 From all of this I feel that it's appropriate, with
18 regard to the common stock, to certify the class from the
19 entire period. As to the preferred and the debt, there is
20 a larger question. Although there was significant price movement
21 following the 8-K of October 29, 2014, that is not proof
22 sufficient to go backward in time. The Latin notion is *post*
23 *hoc ergo propter hoc* which is a proposition of logic that
24 doesn't follow. That is to say, just because it happened now
25 doesn't mean it happened before. However, the discovery is not

H805arc4

JAMES and FEINSTEIN.

1 going to be affected in the slightest because there are
2 different securities involved. We have convertible senior
3 notes, different classifications, we have common stock and
4 preferred stock coming through a merger and there are senior
5 notes that are coming, there will not be variation in discovery
6 because of this, and there will be time later in the case to
7 fine tune the class.

8 So, this is my holding on the point of certification.
9 Do I need to make further finding, Ms. Wyman, on this point?

10 MS. WYMAN: No, your Honor.

11 I just wanted to be clear that your holdings on market
12 efficiency applied to the 10b case and don't have anything to
13 do with the Section 11 claims that we have got.

14 THE COURT: What difference would it make? First of
15 all, in Section 11, market efficiency is not critical because
16 it is a strict liability case based on misrepresentations and
17 the burden is on the defendants to disprove liability and
18 disprove causation.

19 MS. WYMAN: Right; and there is no reliance element.
20 I wanted to make sure I understood clearly.

21 THE COURT: I don't draw any distinction between the
22 theories of action at this point.

23 MS. WYMAN: Thank you, your Honor.

24 THE COURT: Anything further I need to find?

25 MS. WYMAN: Nothing that jumps to mind right now.

H805arc4

JAMES and FEINSTEIN.

1 THE COURT: Mr. Edelman?

2 MR. EDELMAN: Your Honor, we have two additional
3 issues that have been raised with respect to class
4 certification.

5 THE COURT: Causation.

6 MR. EDELMAN: The damages issues and the adequacy
7 issues.8 THE COURT: Yes. So, the adequacy would be
9 propositions of law. Causation would also require experts,
10 right?

11 MR. EDELMAN: We can do a very short examination.

12 THE COURT: Why don't we do that.

13 MR. EDELMAN: Our focus will be -- our focus is lack
14 of a model to show damages for the period prior to May 8th
15 under the Comcast case. I don't know if it makes sense to have
16 Dr. Feinstein start by explaining how he is going to do that.17 MS. WYMAN: I was just going to stand up and ask, your
18 Honor, if we could do it that way.19 THE COURT: Okay. So, should I excuse Dr. James and
20 put Dr. Feinstein back on?

21 WITNESS JAMES: Do we exchange seats?

22 THE COURT: You can do that, too.

23 You can collect the books on the table, Ms. Wyman.

24 MS. WYMAN: Yes.

25 STEVEN P. FEINSTEIN, recalled.

H805arc4

Feinstein - redirect

1 REDIRECT EXAMINATION

2 BY MS. WYMAN:

3 Q. Dr. Feinstein, as part of the opinions that you rendered in
4 this case, did you also offer damages methodologies for both
5 the Section 10b claims and the Section 11 claims that are
6 alleged in plaintiff's complaint?

7 A. Yes.

8 Q. Can you please describe the methodology that you proffered
9 for the 10b claims?10 A. The 10b damage methodology is an inflation-driven
11 methodology.12 Using valuation tools, the damage expert can calculate
13 what the security prices would have been at each point in time
14 prior to the -- over the course of the class period, assuming
15 on the assumption of full information and full disclosure -- it
16 is called the but-for price -- and then compare the but-for
17 price to the actual price to calculate how much the security
18 price was inflated by the alleged misrepresentations and
19 omissions. The damage formula for each investor therefore
20 would be the change in artificial inflation over his or her
21 holding period or the change in price, whichever is less,
22 subject to various statutory caps.23 Q. And, does the fact that ARCP's business changed and grew
24 during the class period impact at all the methodology that
25 would be employed to calculate damages for the Section 10b

H805arc4

Feinstein - redirect

1 claimants?

2 A. No. Just as analysts and investors value the stock in
3 real-time across the entire class period, a forensic analyst
4 can value what the stock would have been worth over the course
5 of the class period under the but-for assumptions.

6 Q. And, am I correct in understanding that the same
7 mathematical formula, once it is derived, would be applicable
8 to each class member?

9 A. Yes.

10 Q. And did you have a different methodology from the
11 Section 11 claim?

12 A. Yes.

13 Q. Can you please describe that?

14 A. It is a statutory formula, it is in the Section 11 statute.
15 It is the entire declining, the entire investment loss that an
16 investor suffered over his or her holding period less any
17 amount of that loss attributable to what is called negative
18 causation; any amount of that loss that defendants can prove
19 was caused by something else.

20 Q. And in the Section 11 claimants' analysis is the same
21 formula applied to each person or each claimant?

22 A. Yes.

23 Q. And are the methodologies that you ascribed consistent with
24 the theories of liability that are outlined in plaintiff's
25 complaint?

H805arc4

Feinstein - redirect

1 A. Yes.

2 THE COURT: That's not going to help.

3 MS. WYMAN: That's the legal standard in *Comcast*, your
4 Honor. I have no more questions.5 THE COURT: You need to develop the first proposition
6 that had the misrepresentations not been made the price would
7 have been some degree less.

8 BY MS. WYMAN:

9 Q. Dr. Feinstein, how would you determine what the but-for
10 price was in your Section 10b model that you described?11 A. I would look at how analysts were valuing the stock at each
12 point in time and overlay that with an assumption that they
13 knew additional information which is the alleged
14 misrepresentations and omissions that are eventually disclosed.
15 So, for example, that they should disregard financials, that
16 there are internal control issues. Whatever was --17 THE COURT: Let me see if I can do it the way I
18 understand it.19 So, an analyst on a REIT would value the stock
20 according as one important measure the quantity of adjusted
21 funds from operations?

22 THE WITNESS: Pardon?

23 THE COURT: Adjusted funds from operations.

24 THE WITNESS: That's right.

25 THE COURT: Namely, the cash flow that a business

H805arc4

Feinstein - redirect

1 throws off less expenses including expenses for normal and
2 containable repairs and maintenance.

3 THE WITNESS: Correct.

4 THE COURT: And this would be an important measure?

5 THE WITNESS: Absolutely.

6 THE COURT: And the damages expert could quantify how
7 much of a price would be inflated according to inflated
8 estimates of this adjusted fund from operations.

9 THE WITNESS: That would be one important
10 consideration. There are others.

11 THE COURT: And some of the others are?

12 THE WITNESS: That the financials were deemed to be
13 unreliable, and that essentially in the finance literature it
14 is called the opaque or dark financials that you cannot trust
15 the financial information coming out about the company. There
16 is a literature on how that impacts valuation.

17 THE COURT: Anything else? Any other factors?

18 THE WITNESS: Well, related to that is other
19 information that ultimately came out which relates to the same
20 thing, simply that there were internal control issues at the
21 company.

22 THE COURT: So, to the extent that information is not
23 reliable there is a lower factor relating to price of the
24 stock.

25 THE WITNESS: Correct. There is a literature, there

1 H805arc4

2 Feinstein - recross

3 are articles on reputation effect.

4 THE COURT: Got it.

5 THE WITNESS: If management has a poor reputation
6 there is a discount for that.

7 THE COURT: I'm satisfied.

8 Cross, Mr. Edelman?

9 RECROSS EXAMINATION

10 BY MR. EDELMAN:

11 Q. Dr. Feinstein, your Section 10b methodology in your report
12 is set forth at pages 73 to 75, correct?

13 A. I don't know. I don't have it in front of me right now.

14 MS. WYMAN: May I, your Honor?

15 THE COURT: Yes.

16 THE WITNESS: Paragraph 74?

17 BY MR. EDELMAN:

18 Q. Pages 73 to 75.

19 A. Okay.

20 Q. That's where you set forth your theory as to how damages
21 would be measured in this case, correct?

22 A. The model.

23 Q. The model, right?

24 A. Right.

25 Q. And under your model you state that the first thing you
would look at is the amount of the price decline when there is
corrective disclosure in that paragraph first, correct?

H805arc4

Feinstein - recross

1 A. No. It says valuation tools, which would include the event
2 study analysis, so it is all valuation tools including the
3 event study analysis and potentially other empirical analyses,
4 if necessary, would be used to establish.

5 Q. But you were asked to provide the methodology that you
6 would use, right?

7 THE COURT: Mr. Edelman is pointing out that you start
8 with the fall in the prices when proper information is
9 disclosed.

10 THE WITNESS: That certainly would be one
11 consideration. That is a valuable source of information about
12 the impact of the omitted news, information.

13 BY MR. EDELMAN:

14 Q. And the amount of decline on October 29th, do you know
15 approximately what it was?

16 A. Approximately 20 percent.

17 Q. And when that decline happened, you are aware that there
18 were corrections made for the prior two quarters' AFFOs,
19 correct?

20 A. My understanding is that the -- yes. Yes.

21 Q. And let's say with respect to a class member who purchased
22 in late 2012 or early 2013, there was no definitive information
23 provided to the market about what the true state of facts were
24 or weren't in 2012 or 2013, right?

25 A. That's not accurate that they learned nothing about 2013

H805arc4

Feinstein - recross

1 and prior years. That's not accurate. They learned a lot
2 about 2013 in prior years.

3 Q. And what did they learn?

4 A. They learned that the company was disavowing the 2013
5 financials.

6 Q. So they learned --

7 A. And that the company was continuing an investigation into
8 that year and earlier years.

9 Q. But you would agree that they were not made aware of
10 whether the financials would change or how much they would
11 change, correct?

12 A. The quantification of an eventual restatement was not
13 offered at that time but the likelihood that there would be a
14 restatement and that there was a disavowing of the financials
15 was made public then.

16 Q. Why didn't you take the step of offering a model as to how
17 you were going to measure damages for a stockholder who
18 purchased in late 2012 or early 2013 given that you have
19 offered no way of measuring the percentage of that 20 percent
20 decline that you would attribute to being in the stock price on
21 any prior day?

22 A. This is a model. I do describe a model.

23 Q. Sir, it is really, with all respect, this is not a model,
24 it is a description that is very generic of what --

25 THE COURT: It is what it is, Mr. Edelman.

H805arc4

Feinstein - recross

1 THE WITNESS: It is not the actual damage methodology,
2 it is not the damage calculation. The full record in this case
3 hasn't been developed so that the damage expert would know
4 precisely what are the actionable misrepresentations and
5 omissions ultimately.

6 BY MR. EDELMAN:

7 Q. You have not come forward with any damage methodology that
8 would measure damages for the period prior to May 8th, 2014,
9 correct?

10 THE COURT: Or even afterwards.

11 A. No, but I have, moments ago.

12 THE COURT: You showed that there would be an effect
13 but you haven't quantified the effect.

14 THE WITNESS: I haven't done the damage calculation
15 but we could use discounted cash flow measures, we can use
16 valuation multiple measures, we can use the literature on
17 reputation effect, we can use the literature on opaque
18 accounting and use the Akerlof Nobel Prize-winning work on
19 pricing things to worse when the market doesn't know.

20 BY MR. EDELMAN:

21 Q. So, what I am hearing is that all of the options of
22 economics are available to you within evaluation tools and
23 potentially other empirical analyses, if necessary?

24 A. Yes.

25 Q. But you haven't told us how you are going to go about doing

H805arc4

Feinstein - recross

1 that in connection with class certification.

2 A. I haven't done the calculation. We don't yet have all the
3 facts for doing damage calculations.

4 THE COURT: What is my burden at this time?

5 MR. EDELMAN: Under *Comcast*, they are obligated to
6 come forward with a model that can demonstrate that they can
7 prove damages on a class-wide basis.

8 THE COURT: I think he has given sufficient model.

9 MR. EDELMAN: Your Honor, the way that he proposed
10 that he would measure damages through this back-casting is not
11 going to work for the period prior to May 8 because there is no
12 way that you can attribute some portion --

13 THE COURT: May 8, 2014.

14 MR. EDELMAN: May 8, 2014. There is no way you can
15 attribute some portion of that stock price decline to, well,
16 that amount of inflation was in the stock price on a random day
17 in 2013 because the market didn't even know on October 29th,
18 2014 whether there would be a change in 2013, what the change
19 would be, how big it would be.

20 THE COURT: So this is a legal argument, right?

21 MR. EDELMAN: Well, I think under *Comcast* the burden
22 was on the plaintiffs to come forward with a model --

23 THE COURT: This is a legal argument. We have gone as
24 far as we can with Dr. Feinstein, haven't we, Ms. Wyman?

25 MS. WYMAN: Yes. And actually your charge, at this

H805arc4

James - redirect

1 point --

2 THE COURT: I am asking a simple question.

3 MS. WYMAN: Yes.

4 THE COURT: Are we now going to go into a legal
5 argument?

6 MS. WYMAN: Yes.

7 THE COURT: We don't need Dr. Feinstein any more?

8 MS. WYMAN: I don't believe so.

9 THE COURT: We don't need Dr. James any more?

10 MS. WYMAN: Yes.

11 MR. EDELMAN: It might be useful just to hear from
12 Dr. James why --

13 THE COURT: Exchange places, gentlemen.

14 CHRISTOPHER MARTIN JAMES, recalled

15 REDIRECT EXAMINATION

16 BY MR. EDELMAN:

17 Q. Dr. James, have you considered the analysis put forth by
18 Dr. Feinstein at pages 73 to 75 and specifically with respect
19 to how that would be applied for damages prior to May 8, 2014?

20 A. I have.

21 Q. And based on your experience as an expert on damages, what
22 is your view about use of a back-casting model to estimate
23 damages?24 A. Well, you can use a back-casting model only as far back as
25 the corrective disclosure pertains to. The corrective

H805arc4

James - redirect

1 disclosure, as it pertains to AFFO, the key performance
2 characteristics that plaintiffs allege was misrepresented, the
3 company announces that it's going to restate AFFO for the first
4 two quarters of 2014. It doesn't indicate that there are
5 problems with the AFFO calculation on earlier dates. And that
6 as a result, the corrective disclosure date tells me nothing
7 about what potential inflation might be in the stock or the
8 various securities prior to May 8, 2014. It is just not a
9 methodology that can be applied throughout the class period.
10 It only applies to the first two quarters of 2014.

11 Q. Now, what about with respect to the preferred stock and the
12 bonds. You heard earlier Dr. Feinstein testify that because of
13 the equity cushion in the stock, preferred stock and the bonds,
14 he would not have expected AFFO results to have had any effect
15 on the preferred stock or the bonds. How would that affect
16 damages for those securities?

17 A. He is basically saying that the equity buffer is such that
18 those securities that are senior in the capital structure are
19 not expected to be affected by the AFFO miscalculations, at
20 least there is no direct evidence of that from, during the
21 class period.

22 MR. EDELMAN: Your Honor, they can cross-examine, if
23 they would like.

24 MR. DROSMAN: May I cross, your Honor?

25 THE COURT: Yes.

H805arc4

James - recross

1 RECROSS EXAMINATION

2 BY MR. DROSMAN:

3 Q. Dr. James, you don't opine in your report that a damage
4 analysis in this case is not feasible, correct?

5 A. That's correct.

6 Q. And you don't opine in your report that you could not
7 measure Section 10b damages in this case, do you?8 A. No. As I understand it, I wasn't asked to and that's not
9 the -- my role is not to propose a damage methodology but,
10 rather, to evaluate the extent to which Dr. Feinstein has
11 articulated a damage methodology that's applicable through the
12 class period.13 Q. You don't take issue that statutory Section 11 damages
14 could be calculated under class-wide basis in this case, do
15 you?16 A. Well, I certainly don't disagree that there is a statutory
17 calculation that is applied during the class period, I agree.18 Q. And, you haven't made any effort to prove negative
19 causation for the Section 11 claims in this case, have you?

20 A. I haven't been asked to, no.

21 Q. I'm sorry, I didn't hear you.

22 A. I haven't been asked to, no.

23 I would say that with respect to negative causation,
24 again going back before May 8, I don't see how you would use
25 the curative disclosure for that purpose.

H805arc4

1 Q. And for clarity's sake, that opinion that you just
2 expressed, that is nowhere to be found in your report, is it?

3 THE COURT: He hasn't been asked to do it.

4 THE WITNESS: That's correct.

5 MR. DROSMAN: Thank you, your Honor.

6 THE COURT: Anything more?

7 MR. DROSMAN: Nothing for plaintiffs.

8 THE COURT: Let's go with the legal argument on
9 causation.

10 Are we going to be using the experts any more, folks?

11 MS. WYMAN: I don't believe so.

12 THE COURT: Mr. Edelman, can we discharge the experts?

13 MR. EDELMAN: Yup.

14 THE COURT: Gentlemen, thank you very much.

15 Before I release you -- off the record.

16 (Discussion off record)

17 (Witnesses excused)

18 THE COURT: Bottom line, before we start arguing is,
19 my ability, after rigorous analysis, to find if the
20 misrepresentations can be proved to be the cause of the
21 inflation of a price of a point in the class period. At this
22 point I don't have to find how much the damages are likely to
23 be or even provide a range of damage or even provide a
24 threshold of damage. I believe that my task is to see if there
25 is a relationship between the representations and damages

H805arc4

1 resulting from the misrepresentations.

2 When you start arguing, Ms. Wyman or Mr. Drosman,
3 would you focus on that question first? And, Mr. Edelman,
4 would you do the same?

5 MS. WYMAN: Thank you, your Honor.

6 The question that you just posed actually is not
7 correct. There is no requirement at class certification that
8 plaintiff prove loss causation or causation on any level. All
9 that is required concerning the damages methodology, according
10 to the Second Circuit, is that plaintiffs must be able to show
11 that their damages stem from the defendant's actions that
12 created the legal liability.

13 THE COURT: Is that what I said.

14 MS. WYMAN: That is from *Sykes v. Mel S. Harris &*
15 Associates.

16 THE COURT: Is that what I said?

17 MS. WYMAN: No. You were talking about levels of
18 causation. At least that's how I understood your question.

19 THE COURT: I don't think so.

20 MS. WYMAN: If that's my misunderstanding, I
21 apologize.

22 THE COURT: Okay. Please proceed.

23 MS. WYMAN: What we heard Dr. James describe as
24 necessary before a class can be certified in this case,
25 basically, is requiring that plaintiffs do a causation and

H805arc4

1 damages analysis and set forth the results of it in their
2 market efficiency offering and that simply isn't required. All
3 that is required we show is that there is an ability to
4 calculate those damages consistent with the theory of liability
5 that is pled in the complaint and we have made that showing.

6 THE COURT: *Comcast* rules as follows: A model
7 purporting to serve as evidence of damages in a class action
8 must measure only those damages attributable to that theory.

9 So, I think Mr. Edelman is going to argue that we need
10 at least a model formula, not just rhetoric.

11 MS. WYMAN: That's not what the District Courts have
12 required, that's not what the Second Circuit requires.

13 THE COURT: That is what *Comcast* requires and that is
14 the United States Supreme Court.

15 MS. WYMAN: The Second Circuit case that I just cited
16 to you came after *Comcast* in 2015 and specifically rejects
17 that. It says that whether it --

18 THE COURT: *Sykes v. Mel S. Harris & associates, LLC.*

19 MS. WYMAN: Yes, sir.

20 THE COURT: 780 F.3d 70 at page 82 rules as follows:
21 All that is required at class certification is that the
22 plaintiffs must be able to show that their damages stemmed from
23 the defendant's actions that created the legal liability, that
24 they can prove, through common evidence, that all class members
25 were injured by the alleged conspiracy. They do not have to

H805arc4

1 show at the certification stage by common evidence the precise
2 amount of damages incurred by each class member.

3 That's the rule I have to follow, right?

4 MS. WYMAN: That's right, and we have satisfied that
5 standard, your Honor. It doesn't require us to -- in order
6 to --

7 THE COURT: What proof would you offer?

8 MS. WYMAN: What proof would I offer?

9 THE COURT: Yes.

10 MS. WYMAN: For the damage methodology?

11 THE COURT: Yes.

12 MS. WYMAN: I would offer the description that
13 Dr. Feinstein gave you just a moment ago.

14 THE COURT: Well, he starts with the inflation and
15 goes backward.

16 MS. WYMAN: He starts with the inflation -- he starts
17 with the corrective disclosure and I will note that the
18 corrective disclosure is far broader than either defendants or
19 Dr. James are willing to admit.

20 THE COURT: Yes, because it puts into question all of
21 the 2013 financials.

22 MS. WYMAN: And we argue the 2013 -- that's right; and
23 importantly tells the market that ARCP is admitting that it
24 intentionally falsified at least two quarters' worth of its
25 financials and that the CFO that was responsible for all the

H805arc4

1 public financials is suddenly resigning.

2 THE COURT: So, to the extent that the information is
3 no longer reliable and that information is what investors
4 relied on going back to the beginning of the class period,
5 there would be an effect on the price of the stock.

6 MS. WYMAN: And that's exactly what Dr. Feinstein
7 described he would do.

8 THE COURT: And so, whether he described it or not, an
9 analyst for the stock would make certain predictions on the
10 basis of the cash flow and the profitability, and with regard
11 to preferred and debt as to the security of the company and
12 reliability of the company in paying the dividend, and in
13 having enough funds to give the return of money and payment of
14 interest to the debt holders.

15 MS. WYMAN: That's right.

16 THE COURT: And that would all go into the financial
17 analysis, it would be based on the cash flow and on the
18 profitability of the company and on the asset structure of the
19 company. These are all information that comes out of the
20 disclosures in the financials and to the extent that that
21 information is not reliable or misstated, that affects the
22 price. That's all you need to show right now?

23 MS. WYMAN: That's right.

24 THE COURT: Got it.

25 Mr. Edelman?

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1 MR. EDELMAN: Let's start with *Comcast*.

2 So, in *Comcast*, what the Court had before it was, in
3 contrast to what we just saw here, Dr. McClave, who was the
4 expert there, he designed a regression model comparing actual
5 cable prices in the Philadelphia DMA with hypothetical prices,
6 he came up with a specific damage amount, and he acknowledged,
7 because the Court had the model in front of it to scrutinize,
8 that the model didn't isolate damages resulting from any one
9 theory of antitrust injury, there were multiple theories. We
10 don't have a model in front of us so the threshold issue here
11 is plaintiffs are saying ignore *Comcast*. The way around
12 *Comcast* is you won't be able to say we don't have a damages
13 model that works if we don't put a damages model in front of
14 you. That's the nub of the legal issue here.

15 Now, they rely on the Sykes case. Sykes is an
16 entirely different case. Sykes was a debt collection act case
17 in which a class action was brought against some entities that
18 were allegedly improperly collecting debts and the damages were
19 inevitably going to be individualized damages. The defendants
20 there were trying to knock out the class action by saying there
21 was some new requirement that you could never have a class
22 action if damages are to be individually determined. That's
23 not what we have here.

24 What we have here is either the damages are going to
25 be determined on a class-wide basis or not and the plaintiffs

H805arc4

1 have made a judgment not to put forward a model. And, with all
2 due respect, your Honor's effort to substitute a model for them
3 is not a substitute for what we are entitled to be able to test
4 in this proceeding. We don't have a model. And there are big
5 problems with your Honor's hypothetical model in that --

6 THE COURT: I have been a trial lawyer long enough to
7 know that you can't get a model at the beginning of a case that
8 will stand up at the end of a case, and the effect of having a
9 model now is to trap the plaintiff into a certain way of
10 proving damages that may not be useful later on.

11 MR. EDELMAN: But, your Honor --

12 THE COURT: What that standard is is illusory.

13 MR. EDELMAN: There is a difference between saying
14 somebody has to come forward with a definitive model and then
15 they need to come forward with a model that will work -- I have
16 one, your Honor, do you want it?

17 THE COURT: Sure. You red my lips. Is it underlined?

18 MR. EDELMAN: It is.

19 THE COURT: Does it have handwriting?

20 MR. EDELMAN: I may have handed up the wrong opinion.

21 THE COURT: You handed up Sykes.

22 MR. EDELMAN: Ah, here is Comcast.

23 (Pause)

24 THE COURT: I have to read this case more carefully
25 than I have before, so why don't I defer this decision.

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1 What is next, folks?

2 MR. EDELMAN: So, the last issue we have is to address
3 the adequacy issue.

4 THE COURT: Yes.

5 MR. EDELMAN: Which Ms. Apps is going to argue for us.

6 MS. WYMAN: Just before we exit the damages
7 methodology issue, there is briefing that the parties
8 submitted, the supplemental briefing that the Court asked for
9 at the beginning of August addresses specifically the damages.
10 So, if that's helpful to you.

11 THE COURT: Thank you very much.

12 MR. ROTHMAN: Your Honor, since it is our motion and
13 our burden to prove adequacy would you like us to go first?

14 THE COURT: I don't care.

15 MR. ROTHMAN: Good afternoon, your Honor. Robert
16 Rothman from Robbins Geller on behalf of the plaintiffs.

17 with respect to the 23(a) requirements, the defendants
18 don't challenge the first three of the numerosity, commonality
19 or typicality. So, unless your Honor has questions about
20 those, I will go right to adequacy.

21 THE COURT: I don't.

22 MR. ROTHMAN: With respect to adequacy, the defendants
23 are not challenging the adequacy of 9 of the 11 proposed class
24 representatives, they're only challenging the adequacy of
25 Dr. John Esposito and Union Asset Management and they make no

H805arc4

1 secret about why they want do that. They say that if they
2 could knock out Union Asset Management, there won't be a class
3 representative for the December notes offerings; and if they
4 could knock out Dr. Esposito, there won't be any class
5 representative on behalf of people who receive common stock in
6 the ARCT IV merger. The Second Circuit has warned District
7 Courts to be weary of finding inadequacy where the result may
8 be to relieve defendants of the reliability for certain claims.

9 With respect to Union Asset Management, it is a more
10 than adequate class representative. It has no interest
11 antagonistic to the class and it has hired competent counsel.
12 Defendants' dispute with Union concern the way that Union
13 participated in discovery in this case. What they say is that
14 Union failed to produce witnesses capable of testifying in
15 connection with the 34 separate topics that defendants put in
16 their 30(b)6 notice.

17 THE COURT: Who represents Union.

18 MR. ROTHMAN: Well, we do as class counsel, and the
19 Motley Rice firm does as well.

20 THE COURT: Is Motley Rice here?

21 MR. ROTHMAN: I don't believe so, your Honor, but I
22 was at the Union deposition. Union is based in Germany. They
23 flew two witnesses from Germany to testify about the 34 topics.

24 THE COURT: I don't want to get into this. I'm not
25 going to hold they're inadequate because they were slow to

H805arc4

1 respond to discovery obligations. I just want to let you know,
2 very clearly, that if this pattern of slowness to respond or
3 partially responding continues, even though I may certify them
4 now, I will strike them later.

5 MR. ROTHMAN: Understood, your Honor.

6 THE COURT: I will not accept this conduct.

7 MR. ROTHMAN: Understood, your Honor.

8 THE COURT: I want you to let Mr. Rice and
9 Mr. Migliori know what I said.

10 MR. ROTHMAN: We will do so.

11 The other witness or representative that they are
12 challenging the adequacy of is Dr. John Esposito who is a
13 retired oral surgeon, he practiced for 42 years on Long
14 Island --

15 THE COURT: And he was slow to know what was going on
16 but said that he wanted to sue because he thought that the
17 conduct of defendants was very criticizable.

18 MR. ROTHMAN: That's correct, your Honor.

19 THE COURT: Mr. Edelman, I think these are sufficient.

20 MR. EDELMAN: Ms. Apps, your Honor.

21 THE COURT: Ms. Apps, why does he give you things that
22 you can't argue? I know are you fantastic and I have found
23 from experience that you affect my judgment in very strong ways
24 but you can't win on this particular point.

25 MS. APPS: Will you give me a chance to try?

H805arc4

1 THE COURT: Sure.

2 MS. APPS: Okay. I will be brief.

3 So, starting with Dr. Esposito. Look. He said at his
4 deposition when asked what input he had provided to counsel he
5 said, "Little, at all. I don't recall anything, really. It
6 seemed to me that was in the hands of the lawyer." He's
7 abdicating his responsibility as class representative so we
8 would say --

9 THE COURT: 70 percent of class representatives, if
10 they were honest, would say that.

11 MS. APPS: Well, let me address Union Asset
12 Management.

13 THE COURT: Yes.

14 MS. APPS: And they're the class representative for
15 two Section 11 Counts, Counts Two and Three. Yes, they've been
16 slow but it is a little bit more than just being slow, of
17 course. Your Honor, they missed many deadlines. We got a
18 representation --

19 THE COURT: It is not going to happen anymore.

20 MS. APPS: This was the --

21 THE COURT: It is not going to happen anymore.

22 MS. APPS: I just want to put on the record just one
23 thing, your Honor, which is even as of today, we don't have
24 e-mails, internal e-mails between and among the portfolio
25 managers who purportedly have no recollection of how they made

H805arc4

1 decisions.

2 THE COURT: I think you have got to point out,
3 Mr. Rothman, that the European notion of what is discoverable
4 is not the same as the American notion of what is discoverable,
5 and if they want to be a plaintiff in this court they must
6 conform to the American model. I will not be easy on them if
7 they don't.

8 MR. ROTHMAN: Understood, your Honor.

9 THE COURT: We are going to pass on that.

10 MS. APPS: Thank you, your Honor.

11 THE COURT: But if it is a problem, I want to hear it.

12 MS. APPS: Thank you.

13 THE COURT: The motion to strike as inadequate these
14 two plaintiffs is denied.

15 MR. EDELMAN: I think we are completed with argument?

16 THE COURT: Excellent.

17 MR. EDELMAN: Oh, I'm the class, so we have the Grant
18 Thornton motion.

19 Your Honor, I want to clarify that the Court is not
20 issuing a ruling on class now, that you are going to read
21 *Comcast*.

22 THE COURT: Yes.

23 MR. EDELMAN: And that I just want to be clear, the
24 23F period to consider an appeal does not run until you
25 issue --

H805arc4

1 THE COURT: No. I have not issued decision until I
2 issue a written decision.

3 MR. EDELMAN: And if you wanted to wait until after
4 Labor Day, that would be fine.

5 THE COURT: I probably won't forget and will lose
6 Gabriel.

7 MR. EDELMAN: Thank you.

8 THE COURT: We will go ahead on this.

9 Before I do certify the class, though, I have been
10 troubled in the past by the issue of time in notice. We need a
11 procedure to regulate notice and I also need to be advised on
12 an important policy of when to give notice. I think it may
13 have been Robbins Geller firm or some other firm that waited a
14 very long period of time between the order for class
15 certification and the issuance of a notice. I know that
16 notices are expensive but I am not sure that it is good policy
17 not to give a notice reasonably soon after an order for
18 certification has been granted rather than wait until you see
19 if the case can be settled and just give one notice that
20 accomplishes both the certification and the approval of the
21 settlement.

22 So, I don't want to just drift into that, I want to be
23 advised, I want to know what would be the proper thing to do
24 and I want both sides to contribute to that.

25 So, that means, I think, assuming I order a class

H805arc4

1 certification, we need another time to regulate that so I will
2 be able to regulate the notice and fix the time. And you might
3 think what would be the best way to accomplish that?

4 MR. ROTHMAN: Your Honor, I would suggest that we wait
5 until the appeal period runs before we have that next
6 conference so we can see whether or not there is a 23F appeal
7 and then we will be better able to come up with a date. If
8 there is no 23F appeal, obviously we can send out notice
9 earlier.

10 THE COURT: I agree with that.

11 Mr. Edelman?

12 MR. EDELMAN: That's acceptable. Yes.

13 THE COURT: Okay. Grant Thornton.

14 MR. BENDINGER: Thank you, your Honor.

15 THE COURT: Mr. Bendinger or is it Ms. Walker?

16 MR. BENDINGER: No, it is Mr. Bendinger today.

17 So, Gary Bendinger for Grant Thornton, LLP, your
18 Honor. We have a motion for summary judgment with respect to
19 Count Seven and it is a very straightforward issue. Following
20 discovery I --

21 THE COURT: It is a Section 11 claim, right?

22 MR. BENDINGER: It is a Section 11 claim.

23 THE COURT: That would have to be based on the
24 prospectus.

25 MR. BENDINGER: Correct.

H805arc4

1 THE COURT: And the prospectus issued --

2 MR. BENDINGER: This particular claim, Count Seven,
3 Judge --

4 THE COURT: -- issued September 12, 2014, gave the
5 right to sell privately issued senior notes issued February 14,
6 2014.

7 MR. BENDINGER: Correct.

8 THE COURT: So, how, you might ask, could Section 11
9 cover a private issuance of February 14, 2014 because there
10 couldn't have been a purchase by reason of a prospectus at that
11 time.

12 MR. BENDINGER: And that's the argument. There is no
13 purchaser -- there are two named plaintiffs.

14 THE COURT: Who is going to answer that question?

15 MR. ROTHMAN: I will, your Honor. We are not
16 asserting the Section 11 claim in connection with the February
17 offering.

18 THE COURT: You are not.

19 MR. ROTHMAN: We are offering it in connection with
20 the September registered notes.

21 THE COURT: How can you have claim on registered notes
22 when we are dealing with noteholders who became such in
23 February?

24 MR. ROTHMAN: We are only dealing with the noteholders
25 for the Section 11 claim who exchanged their unregistered notes

H805arc4

1 for the registered notes.

2 THE COURT: And your argument is that you don't need
3 reliance for a Section 11 claim.

4 MR. ROTHMAN: That is our argument, your Honor.

5 THE COURT: Okay.

6 With that introduction, you start.

7 MR. BENDINGER: Judge, on that you have identified the
8 issue and it is a straightforward issue. What you have got,
9 and he just said, is an exchange, and the case law that we have
10 cited is very consistent that exchange participants are not
11 considered purchasers for purposes of Section 11 and they've
12 cited no case to the contrary. So, fundamentally, they have no
13 claim. We are entitled, with respect to these two named
14 plaintiffs, for an entry of judgment as a matter of law because
15 they were not purchasers and, in fact -- in fact -- their
16 almost entire response to this motion for summary judgment on
17 Count Seven was not directed at establishing these two named
18 plaintiffs for purchasers. Their argument was an end around
19 argument, in effect an acknowledgment that they lacked
20 statutory standing to assert this claim but, instead, argue
21 that under class standing, they had the right to assert this
22 claim even though they did not purchase these bonds, registered
23 bonds pursuant to a defective registration statement.

24 THE COURT: So, is an exchange the equivalent of a
25 purchase?

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1 MR. BENDINGER: Excuse me.

2 THE COURT: Is an exchange the equivalent of a
3 purchase?

4 MR. BENDINGER: No.

5 THE COURT: That's exactly the issue I have do deal
6 with, isn't it?

7 MR. BENDINGER: And all that you have got here, Judge,
8 is the exchange of unregistered bond for a registered bond, and
9 what we have cited to the Court is Judge Lynch's decision in
10 REFCO, you have got the Health South decision, you have Safety
11 Clean, you have got Levi Strauss. There is no question in all
12 of that authority that these exchange participants are not
13 considered purchasers and they don't cite a single case to the
14 contrary, nor do they really take on that authority.

15 If you look at their memorandum in opposition it is
16 entirely focused on a class standing argument and the only
17 reason you make a class standing argument is because you do not
18 have statutory standing. If they had statutory standing as a
19 purchaser they wouldn't be arguing they need class standing and
20 they don't have class standing because to have class standing
21 they basically a single case which is the NECA v. Goldman Sachs
22 case.

23 THE COURT: The plaintiff is any person acquiring such
24 security unless it is proved that at the time of such
25 acquisition he knew such untruth and omission. So,

H805arc4

1 Mr. Rothman's argument is going to be that even though he
2 already owned the note, by exchanging it for another note he
3 acquired the new note. I have to refresh my memory about the
4 other cases but I don't think any of them dealt with this
5 proposition.

6 MR. BENDINGER: I'm sorry, Judge?

7 THE COURT: I don't think any precedent dealt with
8 this proposition of an exchange.

9 MR. BENDINGER: Oh, no, they did. REFSCO did, Health
10 South did.

11 THE COURT: They were focused more on whether or not
12 buying on a private placement memorandum was buying on a
13 prospectus and the issue in all of these cases, what is a
14 prospectus. But here it is that we have a prospectus.

15 MR. BENDINGER: No. The issue in those cases, Judge,
16 wasn't so much about was there a prospectus. The issue really
17 is at the time that you acquire these unregistered bonds there
18 is no registration statement, it is a private placement. So,
19 you don't have a registration statement. The investment
20 decision is made at that time. There is an exchange that is
21 already contemplated and there is no reason why somebody
22 wouldn't go ahead and exchange when the exchange offer and
23 opportunity is there.

24 THE COURT: What is the remedy if you can't go under
25 Section 11?

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1 MR. BENDINGER: They've got a Section 10b claim if
2 they can assert it. Right? And that's the point of all of
3 this. And really they cite not a single case -- not a single
4 case -- for the proposition that in this exchange participants
5 are considered purchasers. And they're not. They just aren't.
6 And that's why they spend --

7 THE COURT: I'm not sure they would have a 10b case
8 because they don't have a Section 12 case. I'm not sure they
9 would have a 10b-5 case. Their remedy may be under state law.

10 MR. BENDINGER: In any case, it is not under the
11 contract.

12 THE COURT: Let me hear what Mr. Rothman says and I
13 will come back to you.

14 MR. BENDINGER: Thank you.

15 MR. ROTHMAN: Your Honor, counsel is basing his
16 argument --

17 THE COURT: Wait until you get to the lectern.

18 (Continued on next page)

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1 MR. ROTHMAN: Your Honor, the defendants' argument is
2 what he just said, that the decision to exchange the notes when
3 they bought them in February, the unregistered notes, the old
4 notes or the new notes, was already made in February.

5 THE COURT: Does he physically get a new note?

6 MR. ROTHMAN: Yes. It's a different note, I believe,
7 with a different CUSIP number.

8 THE COURT: When he took the note and the 144, was
9 there any legend on it that said you can't trade this?

10 MR. ROTHMAN: No. They were tradeable. Only
11 qualified institutional buyers could buy them originally, but
12 they could sell those notes. And there was no requirement in
13 this case --

14 THE COURT: This is not a secondary.

15 MR. ROTHMAN: No.

16 THE COURT: The holders were not selling. They were
17 simply exchanging.

18 MR. ROTHMAN: The holders could have kept their old
19 notes after the new notes were registered. They could have
20 sold their old notes. And in fact, what American Realty said
21 to them in the registration statement -- and this is at Wyman
22 Declaration, Exhibit 9, at page SF18603, "Investing in the
23 exchange notes involves substantial risks. You should
24 carefully consider all of the risks described in risk factors
25 beginning on page 15 of this prospectus in addition to other

H80AARC5ps

1 information contained or contained by reference in this
2 prospectus before tendering any old notes." American Realty
3 understood that people did not have to tender these notes and
4 instructed them to consider the registration statement before
5 tendering the notes.

6 In the *Refco* case, what Judge Lynch held was the
7 statements in the registration statement were immaterial, that
8 people would have gone through with the registration anyway.
9 What American Realty did here is said, you don't have to go
10 through with it. You should consider all this information
11 because this information is material. That's why this case is
12 not like *Refco*.

13 THE COURT: This is Lynch as a district judge, right?

14 MR. ROTHMAN: This is Lynch as a district judge.

15 And Grant Thornton says, we didn't cite any cases
16 going our way. In fact, Judge Spatt held in the Eastern
17 District, in this same sort of situation, where the defendant
18 claimed that no one had standing -- and I quote -- "The Court
19 finds that there is at least a question of fact as to whether
20 the bond registration could have had any impact on their
21 decision to participate in the exchange." That same issue of
22 fact is present here and precludes the granting of summary
23 judgment.

24 THE COURT: Why would they not participate?

25 MR. ROTHMAN: Well, for example, TIAA, which owned

H80AARC5ps

1 these bonds, stated, once they learned of ARCP's misdeeds, they
2 basically knocked down everything that they would do with ARC's
3 statement.

4 THE COURT: They were no worse off by exchanging.

5 MR. ROTHMAN: Well, I don't know that, your Honor.
6 They could have sold the notes privately. And there is at
7 least an issue of fact as to whether or not these plaintiffs
8 would have exchanged.

9 THE COURT: They couldn't sell.

10 MR. ROTHMAN: No, they could sell privately. They
11 could sell the unregistered notes privately or they could have
12 held the unregistered notes. The unregistered notes were still
13 being paid. ARCP was still honoring the obligations under
14 those unregistered notes.

15 And even if these plaintiffs did not have standing,
16 then there is class standing. Counsel for Grant Thornton said,
17 all we do is cite one case, *NECA-IBEW v. Goldman Sachs*. It's a
18 second circuit case, on class standing, that's been
19 consistently followed since it was issued, that says, even if
20 you don't have individual standing because you didn't purchase
21 in the offering, if it involves the same concern and you've
22 been damaged by the defendant's conduct, you don't need to
23 purchase at every offering. So a representative who didn't
24 purchase in the note offering could still represent purchasers
25 who did.

H80AARC5ps

1 And that goes for the exchangers as well as the
2 aftermarket purchasers who could trace their notes to the
3 exchange. Because that's the other part of the class. It's
4 not only people who exchanged, but these registered notes were
5 freely tradeable after they were registered.

6 THE COURT: How would you prove that?

7 MR. ROTHMAN: How would I prove what?

8 THE COURT: That shares purchased from the holder of
9 private notes could be traceable to the offering.

10 MR. ROTHMAN: Well, I'm not saying shares purchased
11 from the holders of private notes. I'm saying that people who
12 bought in the market bought the registered notes. They had a
13 separate CUSIP.

14 THE COURT: You could you trace it back to the
15 offering?

16 MR. ROTHMAN: You could trace it to the offering
17 because the registered notes were first issued in the offering.
18 That's the only place these registered notes came from. So
19 anyone who bought those notes later can trace back to the
20 registration statement because there were no other notes with
21 these terms.

22 THE COURT: And Section 11 liability extends to that.

23 MR. ROTHMAN: Yes.

24 THE COURT: For how long a period of time? The
25 statute of limitations?

H80AARC5ps

1 MR. ROTHMAN: The statute of limitations of after one
2 year, your Honor, then someone may need to prove reliance under
3 the statute, or after one year of audited financial statement,
4 I believe it is, then you may need to prove reliance. But for
5 at least that one-year period, there is no reliance element.

6 THE COURT: The decision will be reserved.

7 You want to say anything more, Mr. Bendinger?

8 MR. BENDINGER: Just on this point, your Honor. When
9 you look at their memorandum in opposition to the motion for
10 summary judgment, they do not cite a case establishing or
11 standing for the proposition that an exchange participant is
12 considered to be a purchaser for purposes of Section 11.

13 THE COURT: You need to be an acquirer.

14 MR. BENDINGER: They need to be a purchaser or
15 acquirer. But here --

16 THE COURT: Any person acquiring the security. And he
17 argues that he acquired the security in the exchange.

18 MR. BENDINGER: Yes. They exchanged unregistered
19 bonds for registered bonds, but for all the reasons cited by
20 Judge Lynch when he was a district court judge in *Refco* and the
21 other courts, that is not considered a purchase for purposes of
22 Section 11. It's just not.

23 And that's why, when you look at their memorandum in
24 opposition, for the motion for summary judgment, their entire
25 focus --

H80AARC5ps

1 THE COURT: I have you.

2 MR. BENDINGER: -- is on class standing. And the
3 point about class standing, Judge, and why it doesn't apply --

4 THE COURT: Class standing is really not the issue.
5 It's whether a person acquiring a registered security in
6 exchange for his private security qualifies under Section 11.
7 That's the issue. If he does, there's class standing. If he
8 doesn't, there's no class standing.

9 MR. BENDINGER: Right. We've cited *Refco*, etc.

10 THE COURT: Right. Decision reserved.

11 Go on to argue the class.

12 MR. BENDINGER: OK. So on the -- we have opposed
13 class certification with respect to all Section 11 claims
14 asserted against Grant Thornton. But let me focus specifically
15 to begin with on Counts Four through Six. So you've got the
16 ARCT IV merger. You've got the Cole merger. And you've got a
17 secondary offering in May of 2014. And there are fundamental
18 problems in certifying a Section 11 claim with respect to each
19 of those counts.

20 That fundamental problem is, they cannot trace, and
21 discovery has shown that they have not traced, discovery has
22 established that they did not hold the shares in their name,
23 nor do they know, in some cases, exactly how the shares are
24 held.

25 THE COURT: Do they have to trace it now?

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1 MR. BENDINGER: They haven't traced.

2 THE COURT: For certification.

3 MR. BENDINGER: And here's what we know. Before ARCT
4 IV, there were over 200 million shares in the market. Those
5 shares were commingled. You have ARCT IV merger shares. You
6 have Cole merger shares. You have the secondary offering. All
7 of those get commingled. And when you've got commingled
8 shares, you cannot trace.

9 THE COURT: Who commingled them?

10 MR. BENDINGER: To the extent their held by the DTTC.
11 And that's the --

12 THE COURT: The custodians.

13 MR. BENDINGER: The custodians.
14 And that was the point of the argument, is tracing,
15 number one --

16 THE COURT: Well, how do we know that? Because there
17 are journal entries that are made each time a certificate is
18 taken in by the custodian.

19 MR. BENDINGER: Well, that's the point. You've got
20 record entries. They're not held in their name. They have the
21 burden, at the class certification stage, to come forward and
22 demonstrate that they can trace that the shares they actually
23 acquired in connection with each of those transactions were
24 directly acquired in connection with a defective registration
25 statement. Because the shares acquired in those transactions

H80AARC5ps

were commingled, they can't satisfy their burden, and on this record they have not satisfied their burden. And that's why, when you look at the *Plu de Pol* decision of Judge Forrest, that's why, among other things, she said, OK, in circumstances like this, where you've got these shares that are commingled, you can't separate them, and therefore you can't trace, and as a result of that you have no claim.

And in any event, even if they could trace, which they can't, tracing would be a very individualized issue that would predominate over any alleged common issue.

So for our purpose, Judge, tracing --

THE COURT: There is nothing in the Second Circuit on this, is there?

MR. BENDINGER: On tracing?

THE COURT: Yes. Tracing affected class certification.

MR. ROTHMAN: Your Honor, every case dealing with tracing on class certification says it's premature at this stage.

THE COURT: District court decision.

MR. ROTHMAN: That's correct, your Honor. But -- I'm sorry. I'll let him finish.

MR. BENDINGER: Just to that point, Judge, we could spend almost a full day --

THE COURT: I don't know now whether it can or can't

H80AARC5ps

1 be traced. It would be imprudent to require the plaintiffs to
2 front the considerable amount of money that would be required
3 to do this research, until there's certification.

4 MR. BENDINGER: The point, respectfully, Judge, is
5 that at this stage, the rigorous analysis requires them to do
6 something other than just rely on a pleading.

7 THE COURT: Inherently it's traceable. Inherently if
8 the custodian knows whether something comes in and knows when
9 that particular certificate is moved for one reason or another.

10 MR. BENDINGER: Respectfully, when those shares come
11 in, they are commingled and once they're commingled.

12 THE COURT: The physical certificates may be
13 commingled but the journal entries regarding them may not be.
14 I cannot assume that. I cannot assume that they are not
15 traceable.

16 MR. BENDINGER: If you've got -- the plaintiffs say,
17 OK, ARCT IV, we're going to place an order with Merrill Lynch.
18 We want a thousand shares of ARCP in connection with this ARCT
19 IV transaction.

20 THE COURT: And if the custodian transfers those
21 securities, then you're right, but if it doesn't, you may not
22 be right. I can't assume it.

23 MR. BENDINGER: I'm not asking you to assume anything.
24 It's their burden to come forward with evidence at this
25 juncture that they actually have traced. They have not come

H80AARC5ps

1 forward and done that. And it's an individualized inquiry.

2 THE COURT: Their burden is to show they're traceable,
3 they are traceable. Whether they can in fact be traced is
4 something that I don't know. But I don't think they have to
5 prove it now. Just that they're traceable.

6 MR. BENDINGER: So they argued that it was premature
7 because it goes to the merits, but we just spent most of this
8 day dealing with an issue that goes to the merits, which is
9 market efficiency. And here tracing, to the extent it goes to
10 the merits, also goes to elements of Rule 23 and can be
11 considered at this stage.

12 THE COURT: This is true, and the trend of the case is
13 to require district judges to do more and more on the
14 certification stage, but it hasn't reached this point on this
15 case.

16 I hold that these shares are traceable, though they
17 may not in fact be traced. And at this point in time,
18 requiring them to prove that the shares can be traced is
19 premature. The motion is denied.

20 MR. BENDINGER: Judge, respectfully, I think our
21 position, subject to the ruling, but that any class ultimately
22 certified with respect to ARCT IV, Cole, secondary offering
23 should exclude aftermarket purchases. Just like Judge --

24 THE COURT: Mr. Rothman says they're traceable but not
25 excludable. They are traced. They're not excludable.

H80AARC5ps

1 MR. BENDINGER: The point about the aftermarket
2 purchasers is, just like Judge Scheindlin considered in the IPO
3 decision, there you've got, plainly you're going to have
4 essentially a myriad of mini trials on this individualized
5 issue with respect to each and every one of these aftermarket
6 purchasers.

7 THE COURT: I don't think it works that way.

8 All right. So decision is reserved as to the motion
9 to dismiss Count Seven. Class certification against Grant
10 Thornton is found with respect to Counts One to Six.

11 OK. What's next?

12 I saw there are other pending motions, other people's
13 motions, embracing what we've done today.

14 MR. ROTHMAN: I believe all the other motions were
15 just joinders in either Grant Thornton's motion or American
16 Realty's motion.

17 THE COURT: I saw that Paul Weiss is moving to dismiss
18 the case against Schorsch? Is that pending?

19 MS. SOLOWAY: Yes, your Honor. There's a motion to
20 dismiss pending in one of the opt-out cases, fairly newly
21 filed.

22 THE COURT: I haven't reached that yet.

23 MS. SOLOWAY: You actually don't have a fully briefed
24 motion yet, your Honor. We filed motion papers and we're
25 negotiating a schedule with the plaintiff in that case, which

H80AARC5ps

1 we will first submit to your Honor for approval.

2 THE COURT: Thank you. And you are?

3 MS. SOLOWAY: Barbara Soloway from Paul Weiss.

4 THE COURT: Thank you, Ms. Soloway.

5 Are there any other pending motions in any other ARCP
6 cases?

7 MR. FIGEL: This isn't a pending motion, your Honor,
8 but --

9 THE COURT: Your name, sir.

10 MR. FIGEL: Reid Figel representing ARC Capital.

11 As you probably know, your Honor, we have a hearing or
12 conference to deal with some privilege issues, and this has
13 become --

14 THE COURT: This is Monday.

15 MR. FIGEL: Yes. It's become the ever-shrinking
16 conference. I haven't had a chance to speak to plaintiffs
17 about that. I don't know if you want me to do this now or take
18 a short break.

19 THE COURT: I don't want to cover it now. It's a
20 quarter to 5. We've done enough today. We're supposed to do
21 this on Monday.

22 MR. FIGEL: Yes, but we have a proposal that would
23 obviate the need for us to do anything on Monday. So that's
24 what I would like to raise.

25 THE COURT: I'm all for that.

H80AARC5ps

1 MR. FIGEL: I thought you might be.

2 MS. WYMAN: I haven't heard this proposal yet, your
3 Honor. They haven't discussed it with us.

4 THE COURT: Yes. So do that and let me know.

5 MR. FIGEL: Can I just have a couple minutes with
6 Ms. Wyman?

7 MS. APPS: The only this thing is just, so far, just
8 so we're clear, the plaintiffs have not raised any additional
9 privilege logs for you to consider on Monday. I was fine
10 coming on Monday because we would actually just sit and watch
11 because the plaintiffs have now made no complaints about any
12 additional documents. So I just want to put that on the
13 record, because if we are going to adjourn on Monday, I don't
14 want that to allow additional time for the plaintiffs to come
15 up with additional documents. I think as long as we're done,
16 from the ARCP perspective, which is where we are today, I don't
17 mind what AR Capital and the plaintiffs negotiate between
18 themselves.

19 THE COURT: I do. I would like them to negotiate.

20 MS. WYMAN: I need to address that because that's not
21 entirely accurate. What the plaintiff has told ARCP is that in
22 light of your Honor's granting of their motion for a protective
23 order and your instruction for plaintiff to go back through the
24 logs to make sure that we flag any documents we find outside
25 the scope of your Honor's orders, that we wouldn't be asking

H80AARC5ps

1 your Honor to look at any documents in camera on Monday the
2 28th.

3 THE COURT: You would or would not?

4 MS. WYMAN: We would not at this point in time be
5 doing that because we're not yet prepared to do that. But
6 that's just for ARCP. But that we're not --

7 THE COURT: So would you submit a procedure or
8 timetable that will let me resolve that issue?

9 MS. WYMAN: I have to talk to my partners that are
10 back in San Diego that are trying rigorously to finish the
11 report before we come see you on Monday so that I can give you
12 an idea of what the time frame will be, but right now I can't.

13 THE COURT: What's your name, sir?

14 MR. FIGEL: Reid Figel.

15 THE COURT: Figel?

16 MR. FIGEL: Figel, yes.

17 THE COURT: I get the impression there may not be a
18 session on Monday.

19 MS. APPS: Your Honor, just one thing, because this is
20 important. Your Honor has given plaintiffs two months to come
21 up with documents to complain about on our privilege log. When
22 we appeared on July 18, they had given us thousands of
23 documents. We narrowed the field down to two remaining
24 documents that they would just be disputing in a letter.

25 THE COURT: Just two?

H80AARC5ps

1 MS. APPS: Just two.

2 THE COURT: So let's go ahead on Monday. I'll deal
3 with those then.

4 MS. APPS: Fine. But we think we should be done on
5 Monday. They should not get another bite at the apple
6 concerning another 2,000 documents.

7 MS. WYMAN: No, your Honor. That's not true, your
8 Honor. We don't just have two left. There were two that were
9 specifically raised in that letter as examples, but before that
10 we sent them exhibits that had many hundreds of documents that
11 we were challenging. And the documents at the time we were
12 here on the 18th that were still in issue were the priv --

13 THE COURT: So you knew for a long time that I was
14 going to regulate this on Monday.

15 MS. WYMAN: I understand that. But your Honor issued
16 your protective order motion two weeks, maybe a week and a half
17 ago, and ordered us to go back through the 15 or 16 thousand
18 entries that were that are on their log.

19 THE COURT: So you have only had two weeks to do that?

20 MS. WYMAN: Yes. Plus the 30,000 that we have to deal
21 with for AR Capital. We're trying to do that. But what we've
22 told ARCP right now is that we are doing your Honor's
23 instructed review.

24 THE COURT: When would I be able to resolve these
25 issues?

H80AARC5ps

1 MS. WYMAN: I will be able to tell you that on Monday,
2 your Honor. I can't tell you that right now because I don't
3 know. It's very soon. We're like at the tail end of it.

4 MS. APPS: I just want to register an objection,
5 because your order covered the documents honoring the
6 investigation. There were other documents for other challenges
7 they had. We spent so much of the summer negotiating this.
8 Since the last conference when you directed --

9 THE COURT: You want to go forward on Monday?

10 MS. WYMAN: Yes.

11 THE COURT: Ms. Apps?

12 MS. APPS: I think that should be the end of their
13 ability --

14 THE COURT: You want to go over on Monday?

15 MS. APPS: If that's the end to their privilege
16 objections, yes.

17 THE COURT: I can't rule that now.

18 MS. WYMAN: Your Honor, I know we have a couple
19 hundred documents that we had set aside in arrears that we were
20 going to bring up.

21 THE COURT: They're in New York.

22 MS. WYMAN: They can send them.

23 THE COURT: They're in New York. Why don't you
24 negotiate this. And so we look forward to doing it Monday.

25 MS. APPS: Your Honor, I'm sorry. I have to get on a

H80AARC5ps

1 plane to go to Miami tomorrow for a witness interview in Miami.
2 I'm not in New York. They have had months to come to us --

3 THE COURT: What do you want me to do, Ms. Apps?

4 MS. APPS: To say that their time for objecting to
5 additional privileged document has expired.

6 THE COURT: I'm not going to do that.

7 What's plan B?

8 MS. WYMAN: I think plan B, your Honor, should be on
9 Monday, when we appear before you, I will tell you that we are
10 ready to provide ARCP with a list of the documents that we
11 still challenge, to give them an opportunity to either produce
12 them to us under the 502(d) order that your Honor has already
13 entered or to revoke the privilege that is on it so that we can
14 narrow it down to the documents that we need your Honor's help
15 with.

16 MS. APPS: That's highly prejudicial. You told them
17 on July 18 --

18 THE COURT: What's your proposal?

19 MS. APPS: OK. Why don't we give them -- well --
20 if -- Ms. Wyman, you said that 200 documents you're identifying
21 for the first time tomorrow?

22 THE COURT: Can we go off the record.

23 (Discussion held off the record)

24 THE COURT: Let's go.

25 After extended discussion, all these discovery matters

H80AARC5ps

1 will be adjourned, from August 28 to September 11 at 10:30. I
2 expect at that time that the issue of the privilege log will be
3 regulated between Ms. Wyman and Ms. Apps and, if not, all
4 documents over which privilege is claimed will be brought to
5 court and we'll have a sampling method to test privilege.

6 With regard to Mr. Figel, the same thing.

7 MR. FIGEL: Thank you, your Honor.

8 MS. WYMAN: Thank you, your Honor.

9 MS. APPS: Thank you, your Honor.

10 THE COURT: You don't mean it.

11 OK. So September 11.

12 Is your dispute also privilege?

13 MR. FIGEL: Yes.

14 THE COURT: So make sure that the documents over which
15 privilege is claimed are documents that reflect a request for
16 advice and the delivery of advice. Just because a lawyer's
17 name is mentioned is not a basis for privilege.

18 And with regard to work product, make sure that it's a
19 document which was prepared for litigation or in contemplation
20 of litigation.

21 Mr. Bendinger.

22 MR. BENDINGER: Your Honor, just before we adjourn, I
23 just want to clarify that our time, Grant Thornton's time for
24 any appeal doesn't begin to run --

25 THE COURT: No. We've talked about that.

H80AARC5ps

1 MR. BENDINGER: Thank you.

2 THE COURT: I haven't made any final decision until
3 something comes out in writing.

4 MR. BENDINGER: Thank you.

5 THE COURT: It may come out in pieces, but I'll try to
6 get this out within a few weeks.

7 OK.

8 MS. WYMAN: Thank you very much, your Honor.

9 THE COURT: Lovely to see you.

10 MR. FIGEL: Thank you, your Honor.

11 MS. APPS: Thank you, your Honor.

12 (Adjourned to September 11, 2017)

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1 INDEX OF EXAMINATION

2	Examination of:	Page
3	STEVEN P. FEINSTEIN	
4	Direct By Ms. Wyman	8
5	Cross By Mr. Edelman	47
6	Redirect By Ms. Wyman	72
7	CHRISTOPHER MARTIN JAMES	
8	Direct By Mr. Edelman	79
9	Direct By Mr. Edelman	99
10	Cross By Mr. Drosman	115
11	Redirect By Mr. Edelman	130
12	CHRISTOPHER JAMES and STEVEN P. FEINSTEIN	133
13	STEVEN P. FEINSTEIN	
14	Redirect By Ms. Wyman	146
15	Recross By Mr. Edelman	150
16	CHRISTOPHER MARTIN JAMES	
17	Redirect By Mr. Edelman	155
18	Recross By Mr. Drosman	157

19 PLAINTIFF EXHIBITS

20	<u>Exhibit No.</u>	<u>Received</u>
21	1 and 2	16

22 DEFENDANT EXHIBITS

23	Exhibit No.	Received
24	A and B	84